

# EXHIBIT 2



## Transcript of **Michael Clemens**

Thursday, December 7, 2023

*State of Arizona, et al. v. Merrick Garland, et al.*

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Reference Number: 136275

1 UNITED STATES COURT OF FEDERAL CLAIMS  
2 WESTERN DISTRICT OF LOUISIANA  
3 LAFAYETTE DIVISION  
4

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6 STATE OF ARIZONA, et al.,

7 Plaintiffs,

8 v.

9 MERRICK GARLAND, et al.,

10 Defendants.  
11 -----

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: Case No.  
:  
: 6:22-cv-01130  
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12  
13 Video deposition of MICHAEL CLEMENS, an  
14 expert witness herein, held at 1629 K Street, N.W.,  
15 Washington, D.C., commencing at 9:01 a.m. on  
16 Thursday, December 7, 2023 and the proceedings being  
17 taken down by stenotype and transcribed by Catherine  
18 B. Crump, a Notary Public in and for the District of  
19 Columbia.  
20  
21  
22

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22 VIDEOGRAPHER: DREW VELTZ

1 I N D E X

2 WITNESS: Michael Clemens

3 EXAMINATION PAGE

4 By Mr. St. John: 5, 213

5 By Ms. Fudim: 207, 219

6

7 EXHIBIT NO. DESCRIPTION IDENTIFIED

8 4 - Expert Report of Michael Clemens 19

9 5 - Notice of Deposition 40

10 6 - Handwritten Drawing 170

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P R O C E E D I N G S

VIDEOGRAPHER: We are now on the record in the matter of State of Arizona v. Merrick Garland, et al. Today's date is December 7, 2023 and the time is 9:01.

This is the video-recorded deposition of Michael A. Clemens, being taken at 1629 K street, Northwest, Suite 600, Washington, D.C. 20006. I'm the camera operator. My name is Drew Veltz, in association with TP One. The court reporter is Cathy Crump, also in association with TP One.

Will all attorneys please identify themselves and the parties they represent, beginning with the party noticing this proceeding.

MR. ST. JOHN: Joseph Scott St. John, deputy solicitor for the State of Louisiana and Plaintiff States.

MS. FUDIM: Elissa Fudim on behalf of the United States defendants.

MR. FLEISCHMAN: Matthew Fleischman, DHS.

MR. ST. JOHN: Will the court reporter please administer the oath.

1 Whereupon,

2 MICHAEL A. CLEMENS

3 was called to testify and, having

4 first been duly sworn, was examined

5 and testified as follows:

6

7 EXAMINATION BY COUNSEL FOR PLAINTIFFS

8 BY MR. ST. JOHN:

9 Q. Good morning, Mr. Clemens.

10 A. Good morning.

11 Q. Can you state your full name for the  
12 record.

13 A. Michael Andrew Clemens.

14 Q. Do you understand you're under oath just  
15 as if you were sitting in front of a judge and a  
16 jury?

17 A. Yes.

18 Q. Is there any reason why you can't  
19 testify truthfully today, illness, prescription  
20 drugs, alcohol, anything like that?

21 A. No.

22 Q. Have you ever been deposed before?

1 A. No.

2 Q. Okay. Have you ever testified in court  
3 before?

4 A. No.

5 Q. Let me go over a few rules of the road  
6 just to kind of give you an idea of how this is going  
7 to go. I'll ask questions. Ms. Fudim may object.  
8 Those objections have a purpose, but you should  
9 ignore them unless Ms. Fudim instructs you not to  
10 answer; otherwise, you must answer the question  
11 requested.

12 Understand?

13 A. Yes.

14 Q. On that note, let's protect our court  
15 reporter. She can't record a shake of the head. So  
16 we need a verbal yes, no, or whatever your answer is.  
17 Do you understand?

18 A. I do and I gave one.

19 Q. If you answer the question, I'll assume  
20 you understood the question. So if you need  
21 clarification, please ask.

22 A. I don't think you can assume that I



1 understand everything you say. I might not  
2 understand that I don't understand it.

3 Q. I'd ask that you give questions a fair  
4 meaning as they were being understood by the average  
5 person. If there is an ambiguity in the question, a  
6 distinction you need to make in your answer, or a  
7 particular meaning that you assign to a word, please  
8 let me know.

9 Does that sound fair?

10 A. If there's a particular meaning to a  
11 word that is common to my knowledge, let you know,  
12 yes, I will do that.

13 Q. A question about a genus covers every  
14 species. So a question about dogs would include  
15 golden retrievers, greyhounds, cocker spaniels, etc.

16 Do you understand?

17 If I ask you a question about a category, that  
18 includes everything within the category.

19 A. Can you give me another example besides  
20 the dog, maybe one relevant to the case? I'm not  
21 sure I understand what that means.

22 That means my answer about a broader category

1 applies to each and everything within that category?

2 Q. Correct.

3 A. No matter what the category is. Okay.

4 Q. Your answer should be complete. If your  
5 answer to a question is "A" and "B", that excludes  
6 "C". Do you understand that?

7 A. Yes.

8 Q. You must answer the question asked and  
9 you must do so truthfully and without evasion. Do  
10 you understand?

11 A. Yes.

12 Q. Documents do not speak for themselves.  
13 Going back to the evasive answer instruction, I would  
14 highlight the difference between the, quote, does the  
15 document state "X", end quote, and the question did  
16 "X" happen.

17 Do you understand the difference?

18 A. Do I understand the difference between a  
19 document saying something happened and the thing  
20 happening in reality? Yes, I understand that  
21 difference.

22 Q. I already answered that question is not

1 an acceptable answer. If you think I've asked the  
2 same question twice, you can, of course, give the  
3 same answer, but you can't refuse to answer the  
4 question.

5 Do you understand?

6 A. Yes.

7 Q. We've already hit on one point  
8 protecting the court reporter, so verbal answers, and  
9 we also need to try not to talk over each other, so  
10 one person speaking at a time. Okay?

11 A. Yes.

12 Q. We'll take breaks about every hour or  
13 so. If you need a break, feel free to speak up, but  
14 I would ask that you answer any pending question  
15 before we take a break.

16 A. Yes.

17 Q. When did you first become aware of this  
18 litigation?

19 A. I first became aware of the litigation  
20 in October of last year.

21 Q. How did you first become aware of this  
22 litigation?

1           A.       I got an email from the Department of  
2 Justice.

3           Q.       And what did that email say?

4           MS. FUDIM: Objection, privileged.

5           Don't answer.

6 BY MR. ST. JOHN:

7           Q.       Are you going to accept Counsel's  
8 instruction not to answer?

9           A.       It was part of your instruction to me to  
10 accept her instruction. So yes.

11          Q.       No, sir. You have an independent  
12 choice. You have -- she is rendering advice. You  
13 have to choose to accept that advice.

14          So let me ask you again. Will you answer the  
15 question or will you accept Ms. Fudim's advice?

16          MS. FUDIM: Objection, instruction not to  
17 answer the question.

18          THE WITNESS: I will follow her advice.

19 BY MR. ST. JOHN:

20          Q.       At the time of that email, had you been  
21 retained by the government as an expert?

22          A.       No.

1 MR. ST. JOHN: Counsel, what's the basis for  
2 your instruction not to answer?

3 MS. FUDIM: Privilege.

4 MR. ST. JOHN: To a third party that has not  
5 been retained as an expert?

6 MS. FUDIM: I believe that statements and  
7 communications that are made in seeking to obtain an  
8 individual who's subsequently retained as counsel are  
9 covered under the privilege. The same way as if you  
10 go to a medical doctor or a lawyer and seek advice,  
11 but don't ultimately retain them, that information  
12 remains privileged under the respective privileges.

13 So I instruct the witness not to answer.

14 MR. ST. JOHN: Which specific privilege are  
15 asserting?

16 MS. FUDIM: Attorney-client privilege because  
17 he's an agent of the client.

18 BY MR. ST. JOHN:

19 Q. Mr. Clemens, you're testifying as a  
20 retained expert. Correct?

21 A. I don't know the meaning of that term.

22 Q. You're not a fact witness; you didn't

1 see things going on relevant to this litigation.

2 Correct?

3 A. I'm not familiar with the definition of  
4 a fact witness. Based on the definition you just  
5 gave me, seeing things going on that are relevant, I  
6 don't know what that means either.

7 Q. Sir, you're being paid for your  
8 testimony today. Correct?

9 A. I'm paid for my time at an hourly rate,  
10 yes.

11 Q. And you're being paid for the hours you  
12 spend here today; is that correct?

13 A. That's my understanding.

14 Q. Your ultimate conclusion as a testifying  
15 expert is that the Asylum IFR does not affect the  
16 number of southwest border encounters. Is that an  
17 accurate summary?

18 A. No.

19 Q. What's your ultimate conclusion, sir?

20 A. My conclusion is that the best available  
21 evidence does not contain evidence of a positive  
22 effect of the Asylum IFR on illegal migration, which

1 is fundamentally different from what you said.

2 Q. How is that fundamentally different from  
3 what I said?

4 A. Could you repeat your statement? I'll  
5 point out the exact wording.

6 MR. ST. JOHN: Madam Court Reporter, will you  
7 read back the question.

8 [Whereupon, the pending question was read  
9 back by the court reporter.]

10 THE WITNESS: My charge was to assess whether  
11 there is evidence of a positive effect. That is  
12 fundamentally different from demonstrating that there  
13 is a zero effect. I did not investigate the latter  
14 question, and that's how I interpret your statement.

15 BY MR. ST. JOHN:

16 Q. So you only investigated whether there  
17 is a positive effect, an increase in illegal  
18 migration, yes or no, binary?

19 A. That's not a binary question, because  
20 "only investigated" is ambiguous. I ran three tests  
21 to determine whether there is evidence of a positive  
22 effect. I did not find evidence of that positive

1 effect in any of the three tests that I ran.

2 Q. You did not test for any other effects  
3 than a positive effect?

4 MS. FUDIM: Objection to the form.

5 You can answer.

6 THE WITNESS: My charge in this case was to  
7 assess factual statements in the complaint. The  
8 complaint claims a positive effect. I was assessing  
9 whether there is evidence of that positive effect.

10 BY MR. ST. JOHN:

11 Q. How do you define "positive effect"?

12 A. A rise in illegal migration caused by  
13 the Asylum IFR of 2022 would be a positive effect.

14 Q. Are there any other positive effects  
15 that you tested?

16 MS. FUDIM: Objection to form.

17 THE WITNESS: My charge was to assess whether  
18 there is evidence of a positive effect on illegal  
19 migration caused by the Asylum Processing IFR of  
20 2022. That was my charge.

21 There are -- there are effects within that  
22 are claimed by the complaint that I also



1 investigated, but the central claim is did the Asylum  
2 Processing IFR of 2022 cause an increase in illegal  
3 migration.

4 BY MR. ST. JOHN:

5 Q. So the question you tested was did the  
6 Asylum IFR cause an increase in illegal migration?

7 A. Yes. I determined whether there is  
8 evidence of that positive effect, which is different  
9 from testing whether it happened or did not happen.  
10 Those are fundamentally different things.

11 Q. Sir, you tested whether the evidence you  
12 developed or provided demonstrated an increased level  
13 of illegal migration tieable to the Asylum IFR?

14 A. I don't understand what evidence that I  
15 developed means. I didn't develop evidence.

16 Q. You used the word "evidence" as part of  
17 your test. What evidence were you looking at?

18 A. I used a comprehensive database on all  
19 inadmissible migrants encountered at the U.S.  
20 southwest border published by Customs and Border  
21 Protection. I didn't develop it. They developed it.

22 Q. Is that the only evidence you

1 considered?

2 A. I used also a basic and nonlegal  
3 specialist knowledge of the Asylum Processing IFR,  
4 very broad characteristics of that, especially its  
5 timing. That was important. I looked at, but did  
6 not ultimately use, in forming opinion data about the  
7 Remain in Mexico Policy of 2019. As I note in the  
8 report, I looked it at it, but I did not use it in  
9 forming my opinion.

10 Q. Did you use any other data than the CBP  
11 data, Syracuse TRAC data, and MPP data?

12 A. I used a specific unemployment rate  
13 published by the Bureau of Labor Statistics in one of  
14 the assessments I did. I used definitions of  
15 unaccompanied minor and accompanied minor that were  
16 not within the CBP data, but alluded to in the CPB  
17 data, and there may have been others that don't come  
18 to mind at this time.

19 Q. Sir, now is the time. Was there any  
20 other data?

21 MS. FUDIM: Objection.

22 THE WITNESS: I told you the ones that come

1 to mind at this time. I cannot guarantee to you that  
2 I'm not forgetting one at the moment.

3 BY MR. ST. JOHN:

4 Q. Every piece of data you looked at would  
5 be included in your expert report; is that correct?

6 A. It depends on what you mean by data.  
7 Every piece of quantitative data that I used in the  
8 expert report, the CBP data, both directly from CBP  
9 and via TRAC, the data on MPP that I looked at, but  
10 did not use, the unemployment rate for Hispanic and  
11 Latino workers published by BLS, information about  
12 the timing and nature of the Asylum Processing IFR of  
13 2022, those are the ones that I recall now. I can't  
14 recall any others.

15 Q. But if I wanted an exhaustive list, I  
16 could look at your expert report; is that correct?

17 A. There is no quantitative data I  
18 considered that is not referenced in the report.

19 Q. Is there any nonquantitative data that  
20 you considered that's not referenced in the report?

21 A. I don't know what data means in this  
22 context.

1 Q. Is there anything --

2 A. You mean information?

3 Q. Is there any information you relied on  
4 or considered that is not referenced in your expert  
5 report?

6 A. I relied on a lot of information. I  
7 relied on my training as an economist at Harvard  
8 University. I relied on my 21 years of experience in  
9 doing peer-reviewed research. I relied on my  
10 background in studying international migration,  
11 including movements at the U.S. border.

12 I relied on a great many things that are  
13 implicit in the report, but are not explicitly listed  
14 in the report.

15 Q. Sir, have you seen the complaint in this  
16 litigation?

17 A. Yes.

18 Q. When?

19 A. When is the last time I saw it?

20 Q. When is the first time you saw the  
21 complaint?

22 A. The first time I saw the complaint, I

1 think it was in March of this year, but I don't  
2 recall exactly when the first time I saw it was.

3 MR. ST. JOHN: I'm handing the witness a  
4 document that we will mark as Exhibit 4.

5 [Exhibit No. 4 was marked  
6 for identification.]

7 MS. FUDIM: Is four a continuation of  
8 numbering from a prior dep?

9 MR. ST. JOHN: It's my internal system.

10 MS. FUDIM: Okay. So just to be clear for  
11 the record, there is no one, two, and three at this  
12 dep; we're starting at four?

13 MR. ST. JOHN: Correct.

14 MS. FUDIM: Okay.

15 BY MR. ST. JOHN:

16 Q. Mr. Clemens, you've been retained as an  
17 expert in this litigation. Correct?

18 A. I don't know the meaning of those terms,  
19 "retained" or "expert".

20 Q. Sir, you don't know what an expert is?  
21 You have 21 years of experience and a Harvard degree  
22 and you're testifying today you don't know the

1 meaning of the word "expert"?

2 A. I am familiar with the word "expert" in  
3 the English language. "Retained as an expert" sounds  
4 like a technical legal term. I don't know what it  
5 means.

6 Q. Sir, you signed a contract with the  
7 defendants. The defendants are paying you for your  
8 time and your testimony. Correct?

9 A. It is correct that the defendants are  
10 paying me for my time, including this testimony. I  
11 am not familiar with "retained as an expert". I  
12 don't know if it would contradict the meaning of some  
13 other legal term, and I don't recall the exact  
14 wording of that contract which was signed several  
15 months ago.

16 Q. When was the contract signed?

17 A. I think it was in March, but I can't  
18 remember exactly.

19 Q. Sir, is Exhibit 4 a copy of a report you  
20 prepared?

21 [Witness peruses exhibit.]

22 THE WITNESS: I didn't make this printout. I

1 can't vouch for its accuracy.

2 MR. ST. JOHN: Counsel, I'm going to  
3 represent this is a printout of a document that the  
4 United States produced. Is this Mr. Clemens' expert  
5 report?

6 MS. FUDIM: To me, it appears to be, but I  
7 can't substitute my own statements for that of the  
8 witness, but we will accept your representation for  
9 the purpose of the deposition that this is a copy of  
10 the expert report.

11 BY MR. ST. JOHN:

12 Q. Sir, I ask you to turn to page 11 of  
13 Exhibit 4.

14 Sir, is that your signature?

15 A. Yes.

16 Q. Do you have any reason to doubt that  
17 Exhibit 4 is not [sic] a complete and accurate copy  
18 of your expert report?

19 A. I can't independently vouch for it.

20 Q. That's a different question, sir. Do  
21 you have any reason to doubt that Exhibit 4 is a  
22 complete and accurate copy of your expert report?

1           A.       I would not be able to answer that  
2 question without reading the whole thing.

3           Q.       How long do you think it would take you  
4 to read the whole thing?

5           A.       I don't know. To check every word in it  
6 to see that nothing was changed in it might take half  
7 an hour, 40 minutes.

8           MR. ST. JOHN: Start reading, sir. You can  
9 read it and let me know if that is a copy of your  
10 expert report, and if there's anything that you think  
11 is not part of your expert report, please let me  
12 know.

13          MS. FUDIM: Let's go off the record if you're  
14 going to review it.

15          VIDEOGRAPHER: Off the record. The time is  
16 9:22.

17          [Recess.]

18          VIDEOGRAPHER: On the record. The time is  
19 9:40.

20          MR. ST. JOHN: Mr. Videographer, what time  
21 did we go off record?

22          VIDEOGRAPHER: We went off record at 9:22.



1 BY MR. ST. JOHN:

2 Q. Mr. Clemens, having had 18 minutes or so  
3 to review your Exhibit 4, is Exhibit 4 a copy of a  
4 report you prepared?

5 A. I didn't notice any difference between  
6 this printout and my report.

7 Q. Federal Rule of Civil Procedure 26  
8 requires that your report include, quote, a complete  
9 statement of all opinions the witness will express  
10 and the basis and reasons for them, end quote.

11 Does Exhibit 4 include a complete statement of  
12 all opinions you will express and the basis and  
13 reasons for them?

14 A. As I wrote in the report, I might form  
15 additional opinions if I receive additional evidence.

16 Q. Sir, is that a yes or a no?

17 MS. FUDIM: Objection.

18 BY MR. ST. JOHN:

19 Q. Does Exhibit 4 include a complete  
20 statement of all opinions you will express and the  
21 basis and reasons for them?

22 If your answer is no, you can testify to that,

1 but it's a yes or no question.

2 MS. FUDIM: Objection.

3 THE WITNESS: It's contingent on future  
4 events. If I receive additional information, I might  
5 form additional opinions in considering that  
6 information. So I can't answer a conditional future  
7 event with yes or no.

8 BY MR. ST. JOHN:

9 Q. As of today, does Exhibit 4 include a  
10 complete statement of all opinions you will express  
11 and the basis and reasons for them?

12 A. As of today, does it include all the  
13 opinions I will express? Part of that sentence  
14 refers to today. Part refers to the future.

15 I may express additional opinions in this case  
16 if I receive additional information.

17 Q. Sir, you're obligated to produce a  
18 written report. Do you understand that?

19 MS. FUDIM: Objection.

20 THE WITNESS: I did produce a written report.  
21 I'm not familiar with whether the law obliges me to  
22 do that.

1 BY MR. ST. JOHN:

2 Q. I'm informing you it does. I'm  
3 representing to you that it does.

4 Exhibit 4 is your report. Correct, sir?

5 A. I did not notice any difference between  
6 this printout and my report.

7 Q. Sir, is Exhibit 4 a complete statement  
8 of all opinions you will express and the basis and  
9 reasons for them?

10 A. My report is and I did not notice a  
11 difference between this printout and my report.

12 I just misspoke. Again, you referred to  
13 "will" and I may or may not, as I indicated in the  
14 report, form additional opinions if I receive  
15 additional evidence to consider.

16 Q. Rule 26 requires that your report  
17 include, quote, the facts or data considered by the  
18 witness in forming, end quote, your opinions. Does  
19 Exhibit 4 include a complete statement of all facts  
20 or data considered by you in forming your opinions?

21 A. My report does and I don't notice a  
22 difference between Exhibit 4 and my report.

1 Q. Rule 26 requires that your report  
2 include, quote, any exhibits that will be used to  
3 summarize or support, end quote, your opinions. Does  
4 Exhibit 4 include all of the exhibits you will use to  
5 summarize or support your opinions?

6 A. My report includes all exhibits that I  
7 did use to support the opinions that I expressed in  
8 the report as a matter of the past. You referred to  
9 the future with the word "will", and if I receive  
10 additional evidence, I will consider it in forming  
11 future opinions.

12 Q. Well, sir, the rule uses the word  
13 "will". So the rule is referring to the future  
14 tense. Your point is a fair one, but the rule uses  
15 the word "will".

16 So Rule 26 requires that your report include  
17 any exhibits that will be used to summarize or  
18 support your opinions. Does Exhibit 4 include all  
19 the exhibits that you will use?

20 MS. FUDIM: Objection, calls for a legal  
21 conclusion.

22 You can answer.

1 THE WITNESS: My understanding of the word  
2 "will" in that context refers to my testimony here  
3 today, and between writing the report and today, I  
4 have not received additional evidence that I would  
5 consider in revising or creating additional opinions.  
6 I can't refer to the future starting from today  
7 because, as I wrote in the report, if I receive  
8 additional evidence, I will -- I may form new  
9 opinions.

10 Q. Sir, are you testifying your report may  
11 be incomplete?

12 A. My report is complete given the  
13 information that I had when preparing it and which I  
14 summarize in it.

15 Q. In your report, you state that you,  
16 quote, specialize in research on the causes and  
17 effects of international migration, end quote. Is  
18 that your expertise?

19 A. I specialize in economic research on the  
20 causes and effects of international migration, and  
21 the context of that passage that you quoted is that  
22 I'm an economist.

1 Q. Do you have any other areas of  
2 expertise?

3 A. I don't have expertise relevant to this  
4 case outside of the economics of international  
5 migration, which comprises expertise in statistics  
6 and econometrics which I do use in the report.

7 Q. Mr. Clemens, how long did you spend  
8 preparing your report?

9 A. Preparing this report, I took scores of  
10 hours. I don't remember the exact number of hours.

11 Q. Do you recall how much you billed the  
12 defendants for work preparing your report?

13 A. I believe the amount I've been paid to  
14 date is around \$60,000.

15 Q. And your rate is \$600 an hour?

16 A. Yes.

17 Q. So doing the math, roughly, a hundred  
18 hours to date?

19 A. Yes, including all activities relevant  
20 to preparing the report, such as accessing the data.  
21 I mean, I didn't spend a hundred hours writing it.

22 Q. Did you speak with anyone in preparing

1 your report?

2 A. I discussed everything in the report  
3 with the Department of Justice.

4 Q. Who at the Department of Justice?

5 A. There were many DOJ officials I spoke  
6 to. I cannot remember them all, but some that were  
7 important whose names I do remember include Christina  
8 Greer, Evan Schultz, a man named Erez, E-R-E-Z, whose  
9 last name I can't remember, and Erin Ryan. There  
10 were others who I can't recall.

11 Q. What does Ms. Greer do? What is her  
12 role?

13 A. I don't remember her title.

14 Q. What does Mr. Schultz do?

15 A. I don't recall his title and I'm not  
16 sure that I ever learned his titled.

17 Q. Is Ms. Greer an attorney?

18 A. I don't know her educational background  
19 or her title at the Department of Justice.

20 MS. FUDIM: I'll represent that she's an  
21 attorney.

22 BY MR. ST. JOHN:

1 Q. Is Mr. Schultz an attorney?

2 A. I did not ask him and I don't remember  
3 whether or not he told me.

4 MS. FUDIM: I'll represent that he's an  
5 attorney.

6 BY MR. ST. JOHN:

7 Q. I'm aware that Mr. Reuveni and Ms. Ryan  
8 are attorneys.

9 You said there may have been others. Were  
10 they attorneys?

11 A. I don't know.

12 Q. For the others, what was your  
13 conversation?

14 MS. FUDIM: Objection. I'll instruct not to  
15 answer.

16 MR. ST. JOHN: On what basis?

17 MS. FUDIM: Privilege.

18 MR. ST. JOHN: What privilege?

19 MS. FUDIM: Attorney-client privilege.

20 MR. ST. JOHN: Are you representing that each  
21 other person that the witness spoke with is an  
22 attorney?



1 MS. FUDIM: Or a paralegal or otherwise  
2 affiliated with the Department of Justice.

3 MR. ST. JOHN: Affiliated with the Department  
4 of Justice isn't enough. The Department of Justice  
5 is a defendant here.

6 MS. FUDIM: I instruct the witness not to  
7 answer.

8 BY MR. ST. JOHN:

9 Q. Sir, did you rely on information  
10 communicated to you by the people you spoke with at  
11 the Department of Justice?

12 MS. FUDIM: Objection to form.

13 BY MR. ST. JOHN:

14 Q. You testified that you spoke with people  
15 at the Department of Justice.

16 A. I discussed everything in this report  
17 with the people at the Department of Justice.

18 Q. Did they communicate anything to you,  
19 any information, data?

20 A. Did they communicate information to me  
21 while speaking to me?

22 Q. Information or data that you considered

1 in preparing your report?

2 MS. FUDIM: Objection to form.

3 THE WITNESS: I discussed everything in this  
4 report with people at the Department of Justice and  
5 speaking to a person requires information exchange.  
6 I don't understand the question.

7 BY MR. ST. JOHN:

8 Q. Did anyone at the Department of Justice  
9 provide data to you that you considered in preparing  
10 your report?

11 A. The data that I use are publicly  
12 accessible. I got the data from the CPB website and  
13 from TRAC at Syracuse University and the information  
14 contained in the Asylum Processing IFR published in  
15 the Federal Register and the unemployment statistics  
16 came from BLS.

17 Every piece of data used in the report comes  
18 from publicly-available websites.

19 Q. Professor Clemens, did you select that  
20 day yourself?

21 MS. FUDIM: Objection to form.

22 THE WITNESS: Did I select it? Did I choose

1 to download it?

2 BY MR. ST. JOHN:

3 Q. Did you choose which datasets to use?

4 A. Yes.

5 Q. Did you ask the defendants for  
6 additional data?

7 A. Did I ask the Department of Justice for  
8 additional data to support the conclusions in this  
9 report? I did not.

10 Q. Did anyone affiliated with the United  
11 States Government instruct you to use the particular  
12 datasets that you did use?

13 A. No.

14 Q. Did you consider any testimony in  
15 forming your opinions?

16 A. I don't know what testimony means in  
17 this context. Did I read the court case in order  
18 to --

19 Q. Transcript of a court hearing or a  
20 deposition transcript?

21 A. I can't recall using any court documents  
22 of any kind in preparing this report.

1 Q. Are you aware of testimony by other  
2 witnesses in this case?

3 A. I received and read another expert  
4 report filed in the case by a Mr. Arthur.

5 MS. FUDIM: Can we stop for one second? My  
6 colleague is outside the door and would like to join.

7 MR. ST. JOHN: Off the record.

8 VIDEOGRAPHER: Off the record. The time is  
9 9:54.

10 [Ms. Jackson enters the proceeding.]

11 VIDEOGRAPHER: On the record. The time is  
12 9:55.

13 MR. ST. JOHN: An additional attorney for  
14 defendants has entered the room and sat at the table.  
15 Can you make an appearance.

16 MS. JACKSON: Yes. My name is Sydney  
17 Jackson. I am appearing for OIL DCS.

18 BY MR. ST. JOHN:

19 Q. Looking at Exhibit 4, page 2, you  
20 identify two paragraphs from the complaint that you  
21 were asked to assess; is that correct?

22 A. These passages refer to two different

1 complaints and they are pieced together with  
2 ellipses. So I don't recall whether they represent  
3 one paragraph in the complaint or more than one  
4 paragraph in the complaint.

5 Q. Statements in page 2 of the paragraphs,  
6 at the bottom of page 2, are what you were asked to  
7 assess. Correct?

8 A. I was asked to assess those claims in  
9 the context of the entire complaint, yes.

10 Q. And for Arizona v. Garland, what you  
11 were asked to assess was whether the asylum rule,  
12 quote, induced a significant increase of illegal  
13 migration into the United States, end quote; is that  
14 correct?

15 A. I was asked to assess whether the Asylum  
16 Processing IFR of 2022 would -- caused an increase in  
17 illegal migration into the U.S. in the context of the  
18 entire complaint text. Yes.

19 Q. I think you used the same language  
20 earlier. There's no trick. Illegal migration into  
21 the United States is what you said you were  
22 analyzing. Correct?

1           A.       One of the reasons I say in the context  
2 of the entire text is that the term "illegal  
3 migration" in those passages can't be interpreted  
4 independently of the rest of the text. So it's not  
5 possible for me say that I assessed these words and  
6 these words alone.

7           Q.       So how are you defining "illegal  
8 migration into the United States"?

9           A.       In my report, I test whether -- I  
10 conduct three tests of whether the Asylum Processing  
11 IFR of 2022 caused an increase in CPB encounters with  
12 inadmissible migrants at the southwest border.

13          Q.       Well, that's a different thing from  
14 illegal migration into the United States, isn't it?

15          A.       There is no technical definition of  
16 illegal migration that is broadly accepted in my  
17 discipline. I used the definition that is implicit  
18 in the text of the complaint.

19          Q.       Why did you limit it to the southwest  
20 border?

21          A.       I -- the -- it was my understanding that  
22 the -- that this is a case brought by Arizona and

1 when they were referring to an influx of migrants  
2 into the state, that was the border that they were  
3 speaking about.

4 Q. Sir, I represent the State of Louisiana.  
5 The State of Louisiana is a plaintiff in this case.  
6 Is the State of Louisiana in the southwest border?

7 A. I don't believe Louisiana borders  
8 Mexico, no.

9 Q. The State of Florida is a plaintiff in  
10 this case. Sir, is the State of Florida on the  
11 southwest border of the United States?

12 A. The State of Florida does not border  
13 Mexico, no.

14 Q. It's not on the southwest border; nor  
15 Florida nor Louisiana are on the southwest border of  
16 the United States?

17 Sir, this is -- I have a fifth grade son and  
18 he would know this answer.

19 MS. FUDIM: Objection.

20 BY MR. ST. JOHN:

21 Q. It's a yes or no question, and if the  
22 answer is you don't know, that's fine. You can

1 testify to that.

2 Is Louisiana on the southwest border of the  
3 United States?

4 MS. FUDIM: Objection, asked and answered.

5 BY MR. ST. JOHN:

6 Q. You can answer.

7 A. The State of Florida does not border  
8 Mexico. So I don't believe it's on the southwest  
9 border of the United States as I understand that  
10 term.

11 Q. And the same for the State of Louisiana.  
12 Right?

13 A. Right.

14 Q. And I'm inferring your definition of the  
15 southwest border is the border between the -- the  
16 land border between the United States and Mexico; is  
17 that correct?

18 A. Yes.

19 Q. Mr. Clemens, what did you do to prepare  
20 for today's deposition?

21 A. I carried out the research that I report  
22 in my expert report. I reread that report several



1 times. I reread the complaint. I read cursorily the  
2 report by Mr. Arthur also filed in the case.

3 Nothing else comes to mind.

4 Q. Did you meet with counsel for the United  
5 States?

6 A. During that time, I did meet with them,  
7 yes.

8 Q. Did you meet with counsel for the United  
9 States in the past week?

10 A. No.

11 Q. Did you speak with counsel for the  
12 United States in the past week?

13 A. Before this deposition began?

14 I spoke with the Elissa and Matthew on the  
15 sidewalk.

16 Q. So in the past week, your only contact  
17 with counsel for the United States is speaking with  
18 Elissa and Matthew this morning on the sidewalk?

19 A. Elissa sent me an email containing a  
20 legal document describing the time and place of this  
21 deposition, and if -- I can't remember exactly when  
22 it arrived, but I believe it was more than a week

1 ago. I'm not certain about that.

2 Q. So other than maybe an email containing  
3 a document about the time and place of the  
4 deposition, your only contact with counsel for the  
5 United States over the past week was speaking with  
6 them on the sidewalk this morning?

7 A. I believe so. I can't remember the date  
8 of our last conversation.

9 MR. ST. JOHN: I'm going to hand the witness a  
10 document that we will mark as Exhibit 5.

11 [Exhibit No. 5 was  
12 marked for identification.]

13 BY MR. ST. JOHN:

14 Q. It's a Notices of Deposition of Michael  
15 A. Clemens. Mr. Clemens, is the document that the  
16 United States provided to you about this deposition?

17 [Witness peruses exhibit.]

18 THE WITNESS: I don't see a difference  
19 between this document and the one I got.

20 BY MR. ST. JOHN:

21 Q. Is this document why you're here today?  
22 You're testifying pursuant to a Notice of

1 Deposition. Correct?

2 A. I was already planning to be here when I  
3 received this email.

4 Q. You testified that you did read the  
5 Asylum IFR. Correct?

6 A. I read it cursorily and without legal  
7 expertise that would give me a deep understanding of  
8 its meaning.

9 Q. Mr. Clemens, are you familiar with the  
10 terms "push" and "pull" with respect to migration?

11 A. Those terms are often used in the  
12 migration policy debates. They don't have a  
13 technical definition in economics that I know of.

14 Q. How is the term "push" used in the  
15 migration debate?

16 A. I don't know how everybody involved in  
17 the debate would use it, but many people that I've  
18 spoken to in the migration policy debate refer to  
19 push factors as things that happen without or outside  
20 the United States that would influence people's  
21 decision to migrate to the United States.

22 Q. And how is the word "pull" or "pull

1 factor" used in the migration debate?

2 A. I don't know what any given person in  
3 the debate might mean with that term, but it's often  
4 used to represent events or forces within the United  
5 States that would influence the decision of people  
6 outside the United States to migrate to the United  
7 States.

8 Q. I think one pull factor you recognized  
9 in your report, if I recall, is the unemployment rate  
10 in the United States. Is that a fair example?

11 A. I don't use the term "pull factor" in my  
12 report to my recollection. In the economics  
13 literature, the unemployment rate in the United  
14 States is recognized as a potential influence on a  
15 migrant's decision to come to the United States.

16 Q. Do you agree that domestic policy within  
17 the United States can impact migration?

18 A. Hypothetically, U.S. domestic policy  
19 could impact the decision of people, of some people,  
20 some of the time to migrate to the United States,  
21 yes.

22 Q. Some policies would incentivize

1 migration and some policies might disincentivize  
2 migration; is that fair?

3 A. Some policies could incentivize  
4 migration. Some policies might have no effect on  
5 migration decisions. Some policies might  
6 disincentivize migration. Yes.

7 Q. Do you know if the -- strike that.

8 To your knowledge, is it generally accepted  
9 that the likelihood that a migrant will be released  
10 into the interior of the United States can  
11 incentivize migration?

12 A. In economic research, the migration  
13 decisions are driven by a complex confluence of  
14 relative incentives, information, perceptions, means,  
15 and opportunity and it is certainly not generally  
16 accepted in economics that changes in asylum policy  
17 would necessarily cause changes in behavior, in  
18 migration behavior.

19 Q. Mr. Clemens, that's not the question I  
20 asked. I asked about likelihood of release.

21 If it's more likely that a migrant is going to  
22 be released into the interior of the United States

1 versus detained in a prison, would that tend to  
2 incentivize migration?

3 A. Incentivize migration behavior.

4 Q. What's the difference between migration  
5 and migration behavior?

6 A. Migration behavior is driven by a  
7 complex confluence of relative incentives,  
8 information, perception, means, and an opportunity. So  
9 any given change in one incentive facing a person  
10 making a decision, generally, economic research need  
11 not be exhibited in their behavior.

12 Q. A complex confluence, it's difficult to  
13 tease out -- your testimony is it's difficult to  
14 tease out which particular factor affects migration  
15 behavior; is that correct?

16 MS. FUDIM: Objection to form.

17 THE WITNESS: I don't know what "difficult to  
18 tease out" means.

19 BY MR. ST. JOHN:

20 Q. Sir, you used the term "complex  
21 confluence". What do you mean by complex confluence,  
22 sir?

1           A.       I mean that there are many different  
2   forces affecting people's decisions, including  
3   migration decisions, and the effects of any element  
4   of that bundle are -- could be contingent on other  
5   elements of the bundle.

6           Q.       Your report does discuss employment  
7   rates in the United States as impacting migration.  
8   Correct?

9           A.       It does not take a position on whether  
10   or not they impact it. It notes that in the  
11   economics literature, it is -- they are frequently  
12   considered as a possible influence on migration  
13   behavior, and I include them as a control in one of  
14   the tests that I run for that reason.

15          Q.       Some policies can disincentivize  
16   migration; is that correct?

17          A.       Some U.S. policy could disincentivize  
18   migration for some migrants some of the time,  
19   certainly.

20          Q.       Border enforcement increases, that could  
21   disincentivize migration. Correct?

22          A.       Hypothetically, various kinds of law

1 enforcement activity that could be called border  
2 enforcement could affect the migration incentive of  
3 some migrants some of the time.

4 Q. Risk of detention can affect migration  
5 behavior. Correct?

6 A. I'm not aware of any economic research  
7 testing that hypothesis, but, hypothetically, that  
8 could occur for some migrants some of the time.

9 Q. Sir, there's no trick here. It's common  
10 sense that if there's a high risk you'll get caught  
11 doing something, you could sit in jail or prison for  
12 six months or a year, most people most of the time  
13 are going to be incentivized not to do that thing.  
14 Correct?

15 MS. FUDIM: Objection.

16 THE WITNESS: The decision of a person to do  
17 a thing, including a decision to migrate to the  
18 United States, is driven by a complex confluence of  
19 relative incentives, information, perception, means,  
20 and opportunity.

21 So, for example, if the price of a  
22 cheeseburger were to go down by one cent,



1 hypothetically, that could create an economic  
2 incentive to buy more cheeseburgers, but relative to  
3 other incentives, such as the Burger King is on fire,  
4 that would not necessarily cause a person to buy more  
5 cheeseburgers.

6 So it is not possible to categorically state  
7 that a change in a certain incentive would cause a  
8 behavior. As I said, it's a complex confluence of  
9 relative incentives, information, perceptions, means,  
10 and opportunity.

11 BY MR. ST. JOHN:

12 Q. I think your point is that you could  
13 have offsetting factors, the cheeseburger is a penny  
14 cheaper versus if I go into Burger King to buy the  
15 cheeseburger, I'm stepping into a building on fire.  
16 I'm going to weigh those two things and my behavior,  
17 my ultimate behavior, would incorporate both. My  
18 decision would incorporate both. I'm not going go  
19 buy the cheeseburger if I'm stepping into a burning  
20 building.

21 Is that it?

22 A. Your decision would incorporate the

1 relative incentives, the information and perceptions  
2 that you had, the means at your disposal, and the  
3 opportunity to act. All of those things would need  
4 to align for action to take place and it's not  
5 possible to say that a change in incentives in one  
6 dimension would necessarily be expressed as a change  
7 in behavior.

8 That's not how economists think about  
9 decisions in general and certainly not about the  
10 decision to migrate.

11 Q. You have a drink sitting on the table.  
12 It's out of the frame of the camera. You're a little  
13 bit thirsty. I'll take a wild guess. You're a  
14 little bit thirsty. That's why you got the drink.  
15 Right?

16 Is that fair?

17 A. I'm not thirsty. I like coffee.

18 Q. You think you'll be thirsty at some  
19 point this morning?

20 A. I might be.

21 Q. Professor, if I tell you that if you  
22 take a drink of water, take a drink of that drink,

1 you can spend the next six years sitting in jail, are  
2 you going to take a drink of water or drink that  
3 drink?

4 A. In the economic analysis, people's  
5 decision depend on the confluence of relative  
6 incentives, information, perceptions, and means and  
7 opportunity. So, for example, if I knew that there  
8 was strychnine in the coffee, then I would not.

9 It depends on what is in my information set.  
10 It depends on my perceptions of that information. It  
11 depends on the means at my disposal, and it depends  
12 upon the opportunity I have to act.

13 Q. Sir, I gave you a specific factor: If  
14 you take a drink of something this morning, you're  
15 going to go to jail for the next six years.

16 We can talk about confluences all we want.  
17 You, personally, sir, you're not going to take a  
18 drink, are you?

19 MS. FUDIM: Objection.

20 You can answer.

21 THE WITNESS: In economic analysis, people's  
22 decisions to do anything depends on the confluence of

1 relative incentives of information, perceptions and  
2 means and opportunity.

3 BY MR. ST. JOHN:

4 Q. Sir, that's a pretty strong incentive,  
5 isn't it, sitting a year in jail?

6 Going to jail at all is a pretty strong  
7 incentive not to do something; is that correct?

8 A. People making decisions, including  
9 migration decisions --

10 Q. Sir, I'm not asking about migration  
11 decisions. The possibility of going to jail is a  
12 pretty strong incentive not to do something?

13 MS. FUDIM: Objection.

14 You can answer.

15 THE WITNESS: All else equal, it depends on  
16 what you mean by incentive. Economists never think  
17 of incentives in the absolute, but as relative  
18 incentives.

19 So if the incentive comes along with  
20 something else, such as you can take a drink, but  
21 you'll be immediately shot, then there would not be  
22 an incentive to do it.

1 So I can't answer this question in the  
2 abstract.

3 BY MR. ST. JOHN:

4 Q. Well, if you're going to get shot,  
5 you've got a pretty strong incentive not to take a  
6 drink. Correct?

7 A. I'm getting confused by this question.  
8 You're asking me would I take a drink if was I told I  
9 would get shot if I would not take the drink?

10 Q. We're moving around and around.  
11 So the judge in this case is a career DOJ  
12 prosecutor. He put a lot of people in jail. Did he  
13 spend his entire career putting people in jail for no  
14 reason?

15 MS. FUDIM: Objection.

16 THE WITNESS: I don't know who the judge is.  
17 I'm unfamiliar with his career.

18 BY MR. ST. JOHN:

19 Q. That's not the question I asked. That's  
20 not the question I asked. Please stick to the  
21 question I asked.

22 A. I said I'm unfamiliar with his career.

1 Q. Is the -- for most people most of the  
2 time, is the threat of jail or prison an incentive  
3 not to do things that would cause them to go to jail  
4 or prison?

5 A. It depends on what other incentive  
6 they're facing.

7 Q. That's the net result. That's the net  
8 result.

9 The decision is the net result of all of the  
10 different incentives. Correct?

11 A. Yeah.

12 Q. That's the confluence you talked about?

13 A. Yes.

14 Q. Incentives are the vectors that you have  
15 to sum up. Right?

16 A. My charge in this case was to see if  
17 there was evidence of decisions reflected by actions  
18 taken by people. So that is what I studied in this  
19 case, not hypothetical incentives that they might  
20 have faced in a different world where all else were  
21 equal.

22 Q. Sir, I'm entitled to ask you about

1     hypotheticals.    So we're going to talk about  
2     hypotheticals.

3                 For most people most of the time, the risk of  
4     going to jail or prison for doing a thing is a very  
5     strong incentive not to do that thing; is that  
6     correct?

7                 MS. FUDIM:   Objection, asked and answered.

8                 THE WITNESS:   It depends on what the crime  
9     is.   It depends on what the punishment is and it  
10    depends on what those people's alternatives are.  
11    That's the way that economic analysis would approach  
12    that question.

13    BY MR. ST. JOHN:

14                 Q.       Those are the other factors.   Those are  
15    the other factors, the other incentives.   You have to  
16    sum those things up to get to your confluence.  
17    Correct?

18                 A.       I don't know how to express this in  
19    nontechnical language, but what you're referring to  
20    is called by economists an additively separable  
21    utility function where you sum up the different  
22    incentives to get a certain outcome, and the elements

1 of the decision need not be additively separable.

2 They could interact with each other and multiply each  
3 other.

4 So it's not possible for me to state  
5 categorically that the decision is the sum of  
6 independent incentives that don't depend on each  
7 other.

8 Q. So sitting here today, you won't testify  
9 that the risk of going to jail or prison for doing a  
10 thing is not an incentive to -- strike that.

11 Sitting here today, you will not testify that  
12 the risk of going to jail or prison for doing a thing  
13 is an incentive not to do that thing?

14 A. It depends on how it interacts with the  
15 other incentives that that person faces. I don't  
16 think that I could categorically answer that question  
17 in theory hypothetically across all human behaviors.

18 MS. FUDIM: Can we take 30 seconds for the  
19 restroom, one minute?

20 MR. ST. JOHN: Off the record

21 VIDEOGRAPHER: Off the record. The time is  
22 10:22.



1 [Recess.]

2 VIDEOGRAPHER: On the record. The time is  
3 10:26.

4 BY MR. ST. JOHN:

5 Q. Welcome back, Mr. Clemens.

6 A. Hello.

7 Q. You understand you're still under oath.  
8 Correct?

9 A. Yeah.

10 Q. Things other than policies can impact  
11 migration levels. Correct?

12 A. Things other than government policies  
13 can impact people's decisions to migrant, certainly.

14 Q. Your report acknowledges as an example  
15 the clear seasonal variation in border encounters.  
16 Is that --

17 A. Economic research finds a clear seasonal  
18 pattern in the border encounters, yes.

19 Q. Presumably, economic conditions in  
20 departure countries would impact migration?

21 A. Yes. Economic research finds that one  
22 of the influences on migration behavior is economic

1 conditions in the migrant's country of origin. Yes.

2 Q. Economic conditions in the United States  
3 can impact migration levels. Correct?

4 A. Yes.

5 Q. Political conditions in departure  
6 countries can impact migration levels?

7 A. They can do that, yes.

8 Q. Policy actions in the United States, I  
9 think we've already discussed can impact migration  
10 levels. Correct?

11 A. Yes.

12 Q. A recent example of that is Title 42.  
13 If you slam the border shut, migration slows down a  
14 lot. Right?

15 A. I am not aware of any economic research  
16 demonstrating an effect one way or the other of Title  
17 42.

18 Q. Are you familiar with the southwest  
19 border encounters data?

20 A. I have looked several times at that  
21 data, including for this report. Yes.

22 Q. Does it show a sharp drop in migration

1 coincides with Title 42?

2 A. There were a great many things happening  
3 in early 2020 alongside that policy change. Economic  
4 research does not contain a finding, to my knowledge,  
5 of an effect on Title 42 one way or the other.

6 Q. So despite the sharp drop associated or  
7 the sharp drop in the southwest border encounters  
8 that follow Title 42 being put into effect, the  
9 confluence of multiple policies makes so that you  
10 can't tease out whether it was Title 42; is that your  
11 understanding?

12 A. I'm not aware of a theoretical or  
13 empirical reason myself or in the economic research  
14 literature to assess any particular effect of Title  
15 42 positive or negative on border encounters.

16 Q. Weather can impact migration. Correct?

17 A. The weather can, yes. There are -- the  
18 economic literature has found that weather conditions  
19 in origin countries impact migration decisions. I'm  
20 not aware of economic research documenting that  
21 weather condition in destination countries can impact  
22 migration decisions, but there might be.

1 Q. Natural disasters can immigration  
2 decisions?

3 A. Yes. Economic research finds that to be  
4 the case.

5 Q. A natural disaster in the departure  
6 country might incentivize migration. Correct?

7 A. A natural disaster in the departure  
8 country could change the relative expected welfare of  
9 migrants in the departure country versus the  
10 destination country and, therefore, shape the  
11 incentive to migrant. Yes.

12 Q. And a natural disaster in an intervening  
13 country can do the same thing?

14 If the road is washed out and not there  
15 anymore, that's probably going to disincentivize  
16 migration. Correct?

17 A. It depends on the relative incentives  
18 faced by migrants. If migrants face a strong  
19 incentive to move, one washed-out road may or may not  
20 stand in their way.

21 It also depends, as I said, on the information  
22 about the natural disaster, the perceptions of the

1 natural disaster, and the means and opportunity they  
2 have to act.

3 Q. Well, there are several factors. Some  
4 of those factors are unpredictable?

5 A. What do you mean by unpredictable?

6 Q. You don't know six weeks in advance  
7 there's going to be a natural disaster?

8 A. Oh, certainly.

9 Q. You probably don't know six weeks in  
10 advance there's going to be a coup in a departure  
11 country?

12 A. Depending on the -- there are social  
13 scientists who assert to predict coups with some  
14 accuracy, but they can't be known of a certainty,  
15 absolutely not.

16 Q. Some of those factors could result in  
17 large pulses of migration. Correct?

18 MS. FUDIM: Did you say pulses?

19 [Mr. St. John gestures in the affirmative.]

20 THE WITNESS: You said natural disasters,  
21 coups. Is that what you mean by factors?

22 BY MR. ST. JOHN:

1 Q. Natural disasters, weather. Broader  
2 than coups, we'll say political conditions in  
3 departure country.

4 A. Yes.

5 Q. You can have a sudden change and that's  
6 going to result in a pulse of migration?

7 A. Those could affect migration positively  
8 or negatively.

9 Q. Substantially positively or negatively.  
10 Correct?

11 A. I don't know what you mean by  
12 substantially, but they could affect migration  
13 positively or negatively or both positively and  
14 negatively, resulting in a zero net impact. In the  
15 abstract, it's difficult to say.

16 Q. Are you aware that the Federal  
17 Government has conducted surveys of migrants to  
18 ascertain factors that drive migration?

19 A. I'm not aware of a specific piece of  
20 research published by the Federal Government on that  
21 subject.

22 Q. Are you aware that surveys on that

1 subject have been conducted by the Federal  
2 Government?

3 A. I'm aware of surveys on that subject  
4 conducted by various entities and I don't know of one  
5 that was conducted by the Federal Government itself.

6 Q. Did you review or consider any of those  
7 surveys in forming your opinions?

8 A. I reviewed them -- I've reviewed  
9 several, none of which were conducted by the Federal  
10 Government in doing the -- during the time that I was  
11 preparing this report, but I did not end up using  
12 them and I did not form my conclusions based on them.

13 Q. Are you familiar with the name Raul  
14 Ortiz, O-R-T-I-Z?

15 A. The name rings a bell. I am not  
16 certain, but I associate that name with the CPB and  
17 possibly the U.S. Border Patrol, but I don't have a  
18 clear recollection.

19 Q. Mr. Ortiz was chief of the Border  
20 Patrol. Does that ring a bell or refresh your  
21 recollection?

22 A. I don't remember whether or not I ever

1 knew he was the chief of Border Patrol.

2 Q. If Mr. Ortiz was the chief of the Border  
3 Patrol, would you agree that Chief Ortiz has  
4 expertise on border security?

5 MS. FUDIM: Objection, calls for a legal  
6 conclusion.

7 You can answer.

8 THE WITNESS: I don't have the expertise to  
9 assess the expertise of any Border Patrol official.  
10 I couldn't form an opinion on that.

11 BY MR. ST. JOHN:

12 Q. Are you familiar with the name Rodney  
13 Scott?

14 A. I don't recall that name.

15 Oh. I received a document saying that there  
16 was to be a second expert witness alongside Mr.  
17 Arthur and it's possible that that was him, but I  
18 don't -- but I don't recall clearly.

19 Q. So you have no reason to doubt that Mr.  
20 Scott is an expert in whatever he held himself out as  
21 an expert in?

22 MS. FUDIM: Objection, calls for a legal



1 conclusion.

2 THE WITNESS: I don't know anything about him  
3 and I didn't receive any report by him. What I think  
4 I received, and I'm not sure if that was his name on  
5 the document. It was a -- it seemed to be a notice  
6 that he might be offering expert testimony.

7 Again, I cannot recall whether the name on  
8 that document was Rodney Scott.

9 BY MR. ST. JOHN:

10 Q. Let's turn back to Exhibit 4. I want to  
11 kind of focus on what went into your opinion, kind of  
12 the box of it.

13 You tested the impact of the Asylum IFR based  
14 on the date it went into effect; is that correct?

15 A. I assessed whether the best data  
16 available contained evidence of a positive effect of  
17 the Asylum IFR on illegal migration, which is  
18 different from what you said.

19 Q. Well, in order to assess positive  
20 effect, whether or not there was a positive effect,  
21 you have to know when the Asylum IFR went into  
22 effect. Correct?

1           A.       You referred to testing the impact,  
2       which could be interpreted as estimating the impact,  
3       and I do not estimate the impact. I assess whether  
4       the evidence -- whether there is evidence of a  
5       positive effect, which is different from estimating  
6       what is the effect.

7           That's how those terms are used in economic  
8       analysis and that's how I'm speaking of them.

9           Q.       In order to assess whether there is  
10       evidence of a positive effect of the Asylum IFR, you  
11       have to know when the Asylum IFR went into effect.  
12       Correct?

13          A.       That is one of the features of the  
14       Asylum IFR that would be important to conducting  
15       those tests. Yes.

16          Q.       Another feature of the Asylum IFR that  
17       would be important to your analysis is that it,  
18       quote, remains in effect as I write this, end quote.

19               That's in your report; is that correct?

20          A.       I recall that being in the report and I  
21       recall that being true when I wrote it. Yes.

22          Q.       So as of August 24, 2023, that's -- you

1 can look at your -- the date on your report.

2 A. I believe that's the case. Yes.

3 Q. And that the rule was in effect for that  
4 entire period, the entire period you were looking at  
5 the data from May 31, 2022 through August 24, 2023?

6 A. That's not correct.

7 Q. How is it not correct?

8 A. Because the data only extended through  
9 March 2023 when I did the analysis.

10 Q. Another key item is that CPB's southwest  
11 border encounter data is a consistent data source  
12 over time, meaning that it's accurately counting the  
13 same thing throughout the time period you're using;  
14 is that correct?

15 MS. FUDIM: Objection to form.

16 THE WITNESS: Accurately counting the same  
17 thing? Can you -- I don't understand this question,  
18 is it accurately counting the same thing.

19 Is what portion of the data accurate? The  
20 database as a whole?

21 BY MR. ST. JOHN:

22 Q. Well, the database needs to be recording

1 the same data, the same measurements throughout the  
2 time period. If today, it's measuring kids, and  
3 tomorrow, it's measuring women, and two weeks ago, it  
4 was measuring men, that's not a consistent data  
5 source.

6 The data being measured, it has be the same  
7 data stream being measured and that has to be  
8 consistent. Correct?

9 A. If there are inconsistencies, it would  
10 be important to account for them in forming my  
11 opinion, and I am aware of a couple of  
12 inconsistencies that I did account for.

13 Q. One was the MPP data; is that correct?

14 A. No. I did not use those data in forming  
15 my opinion.

16 Q. So what did you account for?

17 A. There was a change at the beginning of  
18 Fiscal Year 2019 in the definition of accompanied  
19 child that is used in the CPB data.

20 Q. Were there any other changes that you  
21 accounted for?

22 A. I noticed that the CPB data that had

1    been provided to Syracuse University TRAC were only  
2    complete up until May 2022, and after that, they were  
3    incomplete, suggesting that they had been provided by  
4    CPB not long after that, which is why I don't use the  
5    TRAC data in or after June 2022.

6           Q.     Anything else? Any other changes in the  
7    data definitions?

8           A.     There may have been, but not that I  
9    recall right now.

10          Q.     Another key kind of unstated assumption  
11    is that there's an efficient information flow. So  
12    knowledge of the asylum rule was promptly transmitted  
13    to potential migrants, is that a necessary assumption  
14    to your testimony?

15          A.     It is not necessary and it depends on  
16    what you mean by promptly.

17          Q.     Well, if you had a large group of  
18    potential migrants that didn't have access to media  
19    or anything like that -- they were living in the  
20    middle of a forest somewhere in Central America --  
21    and they didn't learn about the asylum rule, it  
22    necessarily couldn't affect their migration

1 decisions?

2           A.       Migration decisions depend on a  
3 confluence of incentives, information, perceptions,  
4 means, and opportunity. So if somebody -- if no  
5 migrants had any information that the rule had  
6 changed, in principle, it would be difficult to  
7 imagine how their behavior could be altered by a rule  
8 they didn't know about.

9           Q.       In our discussion of confluence of  
10 factors, one thing that seems to underlie that is  
11 that the prospective migrants are rational actors.  
12 So the marginal migrant will consider all of the  
13 different influences that kind of come together in a  
14 rational manner to make their decision.

15                   Is that correct?

16           A.       I don't make assumptions about how the  
17 migrants might hypothetically behave. I test whether  
18 there is evidence for certain kind of behavior in CPB  
19 data.

20           Q.       How are you defining positive effect of  
21 Asylum IFR?

22           MS. FUDIM: Objection, asked and answered.

1 THE WITNESS: I test whether the Asylum  
2 Processing IFR of 2022, I test whether there is  
3 evidence that the Asylum Processing IFR of 2022  
4 caused an increase in illegal migration, in the  
5 number of people migrating illegally.

6 BY MR. ST. JOHN:

7 Q. Another key thing for your analysis is  
8 the asylum rule was available to, essentially, all  
9 migrants who fell within its scope. Is that pretty  
10 important?

11 A. That is not an assumption in my  
12 analysis.

13 Q. Okay. So if there were a lottery for  
14 application of the asylum rule and each asylum  
15 applicant only had a one in 100 or a one in 1,000  
16 chance of being subject to the asylum rule, that  
17 would have very little or no impact on their decision  
18 to migrate or their migration behavior?

19 A. The complaint has factual claims that I  
20 assessed asserted that there was an effect. So I  
21 tested whether or not there was evidence of that  
22 effect.

1 Q. I understand that's what you tested.

2 I'm asking a hypothetical.

3 If there was a lottery for application of the  
4 asylum rule, each asylum applicant reaches into a  
5 barrel of numbers and only one in a hundred asylum  
6 applicants are subject to the asylum rule, the asylum  
7 rule would be unlikely to impact the behavior?

8 A. I did not make any assessment of whether  
9 -- of what potential migrants' hypothetical behavior  
10 would be in hypothetical situations. I assessed the  
11 factual claim in the complaint, which was that the  
12 Asylum IFR did their change their incentives in a way  
13 that necessarily caused more illegal migration, in  
14 fact, not in principle.

15 Q. Well, I'm asking you a hypothetical. I  
16 understand what you did assess.

17 The question is if there was a lottery such  
18 that no migrant claiming asylum could be certain he  
19 was going to be subject to the asylum rule, that  
20 would decrease the impact of the asylum rule on his  
21 behavior. Correct?

22 A. Migration decisions are a complex



1 confluence of relative incentives, information,  
2 perceptions, means, and opportunity, and it would not  
3 necessarily have an effect of the kind that you're  
4 describing. It would depend upon the situation.

5 So I can't answer that question in the  
6 abstract.

7 Q. So your testimony today is that even if  
8 the asylum rule had a minimal chance of being applied  
9 to any particular migrant, you can't say whether or  
10 not the asylum rule would impact that migrant's  
11 behavior?

12 A. In my report, I test if there is any  
13 evidence to support the claim that the asylum rule  
14 did cause an immigration increase --

15 Q. Sir, I'm not asking about your report.

16 A. -- in illegal migration. I don't  
17 explore hypothetical scenarios.

18 Q. Sir, I'm exploring a hypothetical. I'm  
19 entitled to explore the hypothetical. So I'm going  
20 to ask the question again.

21 Madam Court Reporter, will you read back the  
22 hypothetical, please.

1 [Whereupon, the pending question was read back  
2 by the court reporter.]

3 THE WITNESS: I cannot testify to something  
4 that I did not study and form a carefully considered  
5 opinion about. So no. I can't say that.

6 BY MR. ST. JOHN:

7 Q. One of the assumptions you expressly  
8 made is, quote, the Asylum Processing IFR does apply  
9 to all other children other than unaccompanied  
10 children. That's at page 9 of your report.

11 Is that correct?

12 [Witness peruses exhibit.]

13 THE WITNESS: I'm not a legal expert, but my  
14 understanding now and when I wrote that is that the  
15 policy changes brought by the Asylum Processing IFR  
16 could potentially change the processing of any child  
17 who is not an unaccompanied child, but it would  
18 depend on the circumstances of the person who is not  
19 an unaccompanied child.

20 BY MR. ST. JOHN:

21 Q. You're using a different word, sir. In  
22 your report, you said the Asylum Processing IFR does

1 apply to all other children, not could, does.

2 A. I'm not a legal expert, but my  
3 understanding at this time is that the Asylum  
4 Processing IFR does not exempt, does not specifically  
5 exempt, children who are not unaccompanied children.

6 Q. So one of the facts, assumptions you  
7 relied on is that, quote, the Asylum Processing IFR  
8 does apply to all other children, end quote, other  
9 than unaccompanied children; is that correct?

10 A. Well, what I mean there is I am  
11 contrasting accompanied children with unaccompanied  
12 children. I'm aware without legal expertise that the  
13 Asylum Processing IFR specifically exempts  
14 unaccompanied children, and I am indicating that  
15 children who are not unaccompanied children are not  
16 specifically exempted from it.

17 Q. Your assumption is that, quote -- sir,  
18 will you turn to page 9 of Exhibit 4.

19 A. Yes.

20 Q. Under paragraph C, the second  
21 sentence --

22 A. Paragraph 30.

1 Q. "The Asylum Processing IFR does apply to  
2 all other children."

3 Did I read that correctly?

4 A. I lack the legal expertise to know if  
5 the Asylum Processing IFR, if the policy change  
6 brought by the Asylum Processing IFR, would pertain  
7 to every single accompanied child. What I meant  
8 there is that the Asylum Processing IFR does not  
9 specifically exempt children who are not  
10 unaccompanied children.

11 Q. That's not what you said, though, is it,  
12 sir?

13 A. The word "does" apply, the meaning of  
14 "does apply", to me, does not necessarily mean that  
15 it would create a change in the disposition of every  
16 single other child. It means that they are not  
17 exempted from it and they could be affected by that.  
18 That's what I meant by that English word.

19 Q. Elsewhere in Exhibit 4, you state that  
20 you, quote, evaluated the effects of the Asylum IFR  
21 in isolation, end quote.

22 A. What do you mean by Exhibit 4? Which

1 paragraph?

2 There's a Figure 4.

3 MR. ST. JOHN: Why don't we go off the record  
4 for just a minute.

5 VIDEOGRAPHER: Off the record. The time is  
6 10:55.

7 [Recess.]

8 VIDEOGRAPHER: On the record. The time is  
9 11:07.

10 BY MR. ST. JOHN:

11 Q. Welcome back, Mr. Clemens.

12 A. Thank you.

13 Q. You understand you're still under oath?

14 A. Yes.

15 Q. I want to go to paragraph 8 of your  
16 report.

17 A. Yes.

18 Q. Can you read the first sentence --  
19 actually, just the first phrase of paragraph 8.

20 A. The first phrase up to the dash?

21 Q. Yes. Correct.

22 A. "I evaluate the effects of Asylum

1 Processing IFR in isolation."

2 Q. And you go on to say you do not examine  
3 whether the Asylum IFR, quote, serves as a necessary  
4 element of a bundle of policies that affect migration  
5 behavior; is that correct?

6 A. Yes. I examined whether there is  
7 evidence that the Asylum Processing IFR was a  
8 necessary and sufficient condition of an increase in  
9 illegal migration, which is a claim in the complaint.

10 Q. How did you isolate the impact of the  
11 Asylum IFR on migration?

12 A. I tested whether the Asylum Processing  
13 IFR by itself exhibits evidence in the CPB statistics  
14 of an increase in illegal migration caused by the  
15 Asylum Processing IFR alone, not in combination with  
16 any other policy.

17 Q. I understand that's what you claim you  
18 did, but the question, my question, is a little bit  
19 different.

20 How did you isolate the impact of the Asylum  
21 IFR itself on migration?

22 A. I conducted three different tests to

1 assess whether there is evidence of a causal impact  
2 of the policy on illegal migration. In economic  
3 analysis, assessing a claim of causation involves  
4 estimating what -- in this case, what the outcome,  
5 which in this case is illegal migration, what that  
6 would have been for people exposed to the policy if  
7 they had not been exposed to the policy, and I used  
8 three different ways of estimating that  
9 counterfactually.

10 Q. I understand that's what you did. My  
11 question is a little bit more narrow.

12 How did you isolate the impact of the Asylum  
13 IFR?

14 MS. FUDIM: Objection, asked and answered.

15 THE WITNESS: Those are the tests that I run  
16 and those are -- what I use are well accepted methods  
17 in econometrics for testing whether there is evidence  
18 of causal effect.

19 BY MR. ST. JOHN:

20 Q. You've earlier testified that migration  
21 behavior is, quote, a complex confluence, end quote,  
22 or it's based on a complex confluence of factors.

1 Correct?

2 A. Yes.

3 Q. So how did you tease out the effect or  
4 non-effect of the Asylum IFR standing alone?

5 A. I did not estimate the effect of the  
6 Asylum Processing IFR. I examined whether there is  
7 evidence of a positive effect of the Asylum  
8 Processing IFR on illegal migration. Those are two  
9 different things.

10 Q. Really, the key thing, though, is you  
11 looked at data from before the date the Asylum IFR  
12 went into effect and after the date it went into  
13 effect; is that it?

14 A. There are two different, fundamentally  
15 different, types of tests that I run. Both of them  
16 are applications of time series econometrics. One of  
17 them uses information only before the date to assess  
18 patterns in people unaffected by the policy, because  
19 the policy hadn't happened yet. The other one uses  
20 information from both before and after the policy,  
21 taking advantage of a subgroup of migrants that were  
22 not affected by the policy.



1 By the policy change, I should say.

2 Q. We're going round and round, but, I  
3 mean, you keep saying that these are the tests you  
4 ran, but I still don't see how you isolated the  
5 effect of the Asylum IFR.

6 A complex confluence of factors is your  
7 testimony. So how did you isolate this one factor?

8 A. My testimony was that, in theory, in  
9 principle, there's a complex confluence of factors  
10 affecting migration decisions. I did not seek to  
11 estimate. I did not quantitatively estimate what the  
12 effect of the Asylum Processing IFR was on illegal  
13 migration.

14 I sought to determine whether is evidence of  
15 the positive effects, which is fundamentally  
16 different.

17 Q. So you can't even rule out a positive  
18 effect; all you can say is that the analyses you  
19 performed did not demonstrate a positive effect; is  
20 that correct?

21 A. I did not seek to and did not study and  
22 did not estimate the quantitative effect of the

1 Asylum Processing IFR on illegal migration. I did  
2 not seek to demonstrate or demonstrate that it was  
3 zero, which I interpret as being synonymous with your  
4 statement of ruling out non-zero quantities. I did  
5 not seek to do any of those things. That's not what  
6 I studied.

7 Q. What level of significance of effect  
8 would you need of statistics?

9 The proper procedure, as you say ex ante, I'm  
10 going to look for an effect at this level of  
11 significance; can you generally calculate that?

12 Based on the data you're anticipating, Okay, I  
13 need a dataset this large to generate an effect of  
14 statistical significance. Right?

15 MS. FUDIM: Objection to form.

16 THE WITNESS: I didn't understand that  
17 question. I did not look for any kind of effect.

18 I assessed whether there was evidence of a  
19 particular effect claimed in the complaint.

20 BY MR. ST. JOHN:

21 Q. What size of effect would you need to  
22 see to establish that there was an increase?

1           A.       I conducted three different tests to  
2     determine if there is evidence of a positive effect.  
3     There was no evidence of a positive effect in any of  
4     those three.

5           Q.       Sir, you can keep repeating this. I'm  
6     asking you a different question, and if we need to,  
7     I'll get the judge on the phone and he has offered.  
8     I'm asking you a very direct question.

9           What size of effect would you have needed to  
10    see to conclude there was, indeed, a positive effect?

11          MS. FUDIM: Objection.

12    BY MR. ST. JOHN:

13          Q.       A change of how many thousands of border  
14    encounters would you have needed to see to establish  
15    a positive effect?

16          A.       I did not see a positive effect in any  
17    of three tests that I ran. So the standard procedure  
18    for a econometrician would be if they observe a  
19    positive effect, to determine whether it is  
20    statistically distinguishable from zero. I did not  
21    observe any positive effect. Therefore, it would be  
22    inappropriate to test whether it is a spurious

1 positive effect, because I did not detect any  
2 positive effect.

3 Q. Well, what -- here's a different way of  
4 asking the question, although, a slightly different  
5 question.

6 What size of effect were you capable of  
7 detecting via your tests?

8 A. I use data on the -- what statisticians  
9 call the full universe of inadmissible migrants  
10 encountered at the southwest border over a 12-year  
11 period. That means CPB represents that that's every  
12 man, woman, and child encountered as an inadmissible  
13 migrant during that period at the southwest border.

14 So there isn't in this dataset what an  
15 econometrician would call a sampling error. We're  
16 looking at all of the data. So an increase of any  
17 magnitude would be an increase in that number, which  
18 I do not detect in any of three tests that I ran.

19 Q. Could you have detected an increase of a  
20 thousand migrants per month?

21 A. There is no increase that is  
22 attributable to the Asylum Processing IFR of 2022 in

1 any of three tests that I ran.

2 Q. It sounds like we're coming back to,  
3 Well, there were generally fewer border encounters  
4 after the rule went into effect than before, so no  
5 positive effect.

6 A. I run three different tests that are  
7 much more rigorous than what you just said. That's  
8 not an accurate summary of what I did.

9 Q. So what size positive effect could you  
10 detect?

11 Could you detect one additional migrant? Your  
12 tests, could they -- if the asylum rule resulted in  
13 one additional migrant, could you have detected that?

14 A. Using the available data and the best  
15 methods that I'm aware of, I don't detect any  
16 additional migrants. What I find in all three cases  
17 is that the evolution of encounters with inadmissible  
18 migrants after the advent of the policy was lower  
19 than the three different estimates of counterfactual  
20 encounters.

21 Q. What other policies were being put into  
22 effect that would impact migration during the time

1 period you examined?

2 A. My charge in this case was not to make a  
3 comprehensive list of every imaginable force that  
4 could affect migration decisions in the relevant time  
5 frame. My charge was to assess whether there is any  
6 evidence of an effect of this policy in the best data  
7 available.

8 Q. So other policies could have affected  
9 migration during the time period you examined?

10 A. That is possible and that is one of the  
11 reasons why I ran the third test that I run.

12 Q. So your dataset was southwest border  
13 encounters data published by CPB on its public data  
14 board. Correct?

15 A. And provided to Syracuse University via  
16 the Freedom of Information Act request. Yes.

17 Q. Why did you go to Syracuse University?

18 A. It's hypothetically possible I could  
19 have requested it myself, but I didn't feel a need to  
20 because it's a -- because I tested its correspondence  
21 with the public data available starting in FY 2019,  
22 and my experience with Freedom of Information Act

1 requests is that they can take several years. My  
2 longest one took five years.

3 So the best course of action was to obtain it  
4 from Syracuse University.

5 Q. Sir, why did you think you needed a  
6 Freedom of Information Act request to obtain this  
7 data?

8 A. I did not independently assess whether  
9 that was necessary. I know that that is how Syracuse  
10 University states that they obtained it.

11 Q. You're working for the people that  
12 collect the data. Why didn't you email Ms. Fudim and  
13 say, Hey, I need this data?

14 You could have gotten it directly from the  
15 Federal Government. Why didn't you do that?

16 MS. FUDIM: Objection.

17 THE WITNESS: I already had the data and I  
18 didn't feel a need to request data that I already  
19 had.

20 BY MR. ST. JOHN:

21 Q. What does southwest border encounter  
22 data include? How is it defined?

1           A.       I'm not a CPB official. I don't have  
2 detailed expertise in how CPB assembles that data,  
3 but they represent it as comprising inadmissible  
4 migrants encountered by USBP or OFO, and the database  
5 covers October 2011 through March 2023.

6           Q.       All right. Your report indicated that  
7 southwest encounter data does not include migrant  
8 protection protocols enrollment. That's at page 5  
9 and page 12 if you need to check.

10          A.       Could you restate that question? It  
11 does not -- my report does not include it?

12          Q.       No. The southwest border encounters  
13 data published by CPB does not include migrant  
14 protection protocols enrollment; is that correct?

15          A.       The database includes all inadmissible  
16 migrants, to my knowledge. That is how CPB  
17 represents the data.

18                I don't have -- I'm not a legal expert. So I  
19 don't know whether enrollment in the MPP requires an  
20 initial encounter and being ruled inadmissible.

21          Q.       Why did you drop an express footnote  
22 about MPP enrollment datasets and state MPP



1 enrollments starting October 2019 are publicly  
2 available directly from CPB?

3 That's part of the southwest border encounters  
4 data. Why did you call it out?

5 A. I didn't use MPP data in forming my  
6 opinion. I considered using it at one point. I  
7 looked in it. I noted in the report that I looked at  
8 it. I did not use it in forming my opinion, as the  
9 report indicates.

10 Q. Sir, turn to page 5 of your report. Can  
11 you read the first sentence of paragraph 15.

12 A. "A minor source of data used only in  
13 Section 24(c) contains monthly enrollments in the  
14 Migration Protection Protocols from January 2019  
15 through August 2022 also obtained from CPB by TRAC."

16 Q. Is that statement correct?

17 A. This is a typo. There's no Figure 14 in  
18 the report and there's no Section 24(c), to my  
19 knowledge.

20 Q. So you actually did some work that you  
21 excluded. Why did you exclude that?

22 A. I was tasked initially with assessing

1 the factual claims in the complaint that I report. I  
2 drew on my economic expertise to formulate tests of  
3 those factual claims.

4 Initially, I thought it might be useful to  
5 consider the effect of other changes in asylum policy  
6 and I later decided against that. That's why I  
7 looked initially at the MPP data, and I left that in  
8 the report because I had looked at it, but I did not  
9 use it in formulating my opinion.

10 Q. Why did you decide not to go down that  
11 road?

12 A. Because of my -- this is the first time  
13 I have done anything like this and I came to  
14 understand that it would require legal expertise I  
15 don't have to assess the relevance of other asylum  
16 policy changes to an evaluation of this asylum policy  
17 change.

18 Q. Why would it require legal expertise?

19 A. I am not familiar with the details of  
20 all of the policy changes brought by the MPP policy  
21 and in making a strong argument that the effects of  
22 that policy are informative about the effects of the

1 policy in this case, I came to realize, but hadn't  
2 realized at the beginning, would have required legal  
3 expertise I don't have.

4 Q. Well, what's the difference between  
5 evaluating the impact of MPP and evaluating the  
6 impact of the Asylum IFR?

7 A. The complaint makes factual claims about  
8 the effect of the Asylum Processing IFR of 2022.  
9 Those were the claims that I was asked to assess, not  
10 any other claims.

11 Q. Did you talk about this other analysis  
12 with the United States?

13 MS. FUDIM: Objection, instruction not to  
14 answer on the grounds of privilege.

15 BY MR. ST. JOHN:

16 Q. Are you going to accept that  
17 instruction?

18 A. Yes.

19 Q. But for Ms. Fudim's instruction not to  
20 answer, would you be able to give me an answer?

21 Do you recall whether you talked about the MPP  
22 analysis with counsel for the United States?

1           A.       I don't understand this question. I'm  
2   instructed to answer, but now you're asking me if I  
3   would be able to answer had I not been instructed  
4   [sic] to answer?

5           Q.       Yeah. Do you have knowledge of whether  
6   you communicated with counsel for the United States  
7   about the MPP analysis?

8           MS. FUDIM: Do you have a recollection one  
9   way or the other as to whether that was discussed?  
10   Without disclosing the answer to that question, you  
11   can answer the limited question if you understand it.

12          THE WITNESS: I think I understand it and the  
13   subject of MPP data was discussed, yes.

14   BY MR. ST. JOHN:

15          Q.       What were the substance of those  
16   discussions?

17          MS. FUDIM: Objection, privileged.  
18   Don't answer.

19   BY MR. ST. JOHN:

20          Q.       Are you going to accept that  
21   instruction?

22          A.       Yes.

1 Q. Are you familiar with the border  
2 security metrics requirement of Section 1092 of the  
3 National Defense Authorization Act of 2017?

4 For the record, it's Public Law 114-328.

5 A. I'm not a legal expert. I don't have  
6 expertise about any law.

7 Q. Did you know that the NDAA of 2017  
8 requires the Secretary of Homeland Security to  
9 develop certain metrics to measure the effectiveness  
10 of Border Security?

11 A. I don't know what the NDAA is. Maybe  
12 you referred to it in the previous -- maybe you  
13 defined it in the previous question. I'm aware that  
14 DHS publishes metrics of interdiction effectiveness.  
15 Yes.

16 Q. Are you familiar with the term  
17 "got-aways"?

18 A. I'm not a legal expert, but my  
19 understanding at this time is that in the  
20 publications reporting the interdiction effectiveness  
21 rate, they refer to got-aways as people who enter the  
22 United States illegally and are detected by methods

1 other than encounter by CPB agents, other than direct  
2 encounter by CPB agents, such as remote sensing, but  
3 I don't have expertise in that area. It's something  
4 I read.

5 Q. For the record, it's defined in NDAA  
6 2017 Section 1092(a)(3) and your definition is pretty  
7 close.

8 So as you defined it, got-aways are limited to  
9 unlawful border crossers that are observed. Right?

10 They have to be detected by technological  
11 means or seen by a Border Patrol agent. You've got  
12 to have some way to count these folks. Right?

13 A. My recollection of the publication of  
14 the interdiction effectiveness rate is that they  
15 don't -- for security reasons, they don't provide a  
16 full accounting of what information they base that  
17 on. They give examples of sensors, remote sensing,  
18 at least one other method, and then there's some  
19 phrase, to the best of my recollection, that refers  
20 to unnamed other methods.

21 Q. I'll make it easier for you. So a  
22 got-away is statutorily defined as, quote, an

1 unlawful border crosser who, "A", is directly or  
2 indirectly observed making an unlawful entry into the  
3 United States; "B", is not apprehended; and, "C" is  
4 not a turn-back. Turn-backs are further defined as,  
5 quote, illegal entrants who agents have scared away  
6 and fled back across the border, end quote.

7 So that's observed. However it's detected,  
8 other means, whatever, there is something to register  
9 that count. Correct?

10 MS. FUDIM: Objection to form.

11 You can answer.

12 THE WITNESS: I imagine -- I'm not an expert  
13 in how they do it, but that sounds plausible to me.

14 BY MR. ST. JOHN:

15 Q. Sir, again, continuing with this  
16 plausibility, some common sense: You know, if the  
17 number of Border Patrol agents devoted to actual  
18 patrol duties decreases, those border patrol agents  
19 are less likely to observe because they're spread  
20 thin on the border; is that a plausible statement?

21 MS. FUDIM: Objection.

22 You can answer.

1 THE WITNESS: It would depend on where they  
2 were deployed to, how many hours they were working,  
3 what they were doing with their time, how the  
4 responsibilities were divided among agents. I don't  
5 know that that would necessarily result in an  
6 increase or decrease of detention.

7 BY MR. ST. JOHN:

8 Q. You don't know one way or another?

9 A. I don't have a reason to think that it  
10 would necessarily cause an effect one way or the  
11 other.

12 Q. If someone with that expertise were to  
13 testify, you'd have no reason to doubt that  
14 testimony?

15 MS. FUDIM: Objection.

16 You can answer.

17 THE WITNESS: I don't have expertise in that  
18 area.

19 BY MR. ST. JOHN:

20 Q. Common sense, it's -- how long is the  
21 southwest border?

22 A. I don't remember. It's thousands of



1 miles long.

2 Q. If you had more eyes on those thousands  
3 of miles, you're more likely to see what's coming  
4 across the border. Correct?

5 MS. FUDIM: Objection.

6 THE WITNESS: It would depend on what the  
7 eyes are doing. So I can answer that the question in  
8 the abstract and I don't have expertise in this area.

9 BY MR. ST. JOHN:

10 Q. On the flip side, if you put more eyes  
11 on the border, you're more likely to observe what's  
12 coming across the border. Correct?

13 MS. FUDIM: Objection.

14 THE WITNESS: It would depend on what the  
15 eyes are doing, and I really have no expertise in  
16 this area.

17 BY MR. ST. JOHN:

18 Q. It's fair that if you devote those eyes  
19 to patrol -- their job is to see or encounter --  
20 they're more likely to observe; is that correct?

21 MS. FUDIM: Objection.

22 THE WITNESS: My -- I don't have legal

1 expertise. I'm not an expert in law enforcement, but  
2 my understanding is that USBP officers have many  
3 responsibilities and only one of them is looking with  
4 their eyes.

5 BY MR. ST. JOHN:

6 Q. Some Border Patrol agent are instructed  
7 to -- here's your pistol, here's your rifle, here's  
8 your handcuffs -- go to the border and observe an  
9 encounter; is that a fair statement?

10 MS. FUDIM: Objection to form.

11 THE WITNESS: I don't -- I'm not an expert in  
12 law enforcement. I could not provide a detailed  
13 accounting of what USBP agents do with their time.

14 BY MR. ST. JOHN:

15 Q. Do you know if the number of Border  
16 Patrol agents devoted to patrol duties varied  
17 substantially during the time you performed your  
18 analysis or the time of your analysis?

19 A. I tested whether the data from CPB on  
20 inadmissible migrants contained evidence of an effect  
21 on the Asylum Processing IFR. That's what I  
22 considered.

1 Q. So you have no idea whether the number  
2 of Border Patrol agent devoted to patrol duties  
3 increased, decreased, or remained the same?

4 A. To the extent that that affected  
5 migration behavior, it would be addressed by the  
6 third test that I run, and that is the reason that I  
7 -- that is the most important reason why I ran that  
8 test in addition to the others.

9 Q. We talked about technological measures  
10 as well, camera, Areostats. You know what a camera  
11 is. Right?

12 A. I don't -- I'm not familiar with the  
13 kind of cameras that USBP uses. I know what a camera  
14 is.

15 Q. Are you familiar with the word  
16 "Aerostat"?

17 A. No. I don't know what an Aerostat is.

18 Q. So you don't whether Aerostats are used  
19 along the border or not?

20 A. I've never heard that word before, to my  
21 knowledge.

22 Q. You don't know whether DHS or Border

1 Patrol maintain balloons called Aerostats for the  
2 radar and cameras down at the border?

3 A. I don't know what an Aerostat is still.

4 Q. Do you know if there are cameras along  
5 the border?

6 A. I'm not an expert on law enforcement in  
7 general or at the border. I have seen photos in  
8 journalistic pieces of cameras mounted at the border.

9 Q. Those cameras or technological measures  
10 -- we'll make it broader than cameras -- were taken  
11 off line during the time period you analyzed. Do you  
12 know whether they were?

13 Do you know whether cameras and Aerostats were  
14 taken off line during the time period of your  
15 analysis?

16 A. My charge in this case was to assess  
17 whether the data on inadmissible migrants contained  
18 evidence of an effect on the Asylum Processing IFR.  
19 My charge was not to collect information on every  
20 possible force that could hypothetically have  
21 affected illegal migration during that period.

22 So I did not look at that.

1 Q. Is the southwest border data -- strike  
2 that.

3 Does the southwest border encounters data that  
4 you rely on include got-aways?

5 A. It includes only inadmissible migrants  
6 who were encountered by CPB, but the got-aways as you  
7 defined them earlier are not in the dataset; however,  
8 my methods are robust in their absence.

9 Q. How are they robust in the absence of  
10 accounting for got-aways?

11 A. Because when two numbers are in a fixed  
12 proportion to each other, a percentage change in one  
13 requires an identical percentage in another and I'm  
14 aware due to the DHS publications that you mentioned  
15 earlier that the interdiction effectiveness rate is  
16 highly stable over time at an average of about 81  
17 percent in Fiscal Years 2014 to 2021.

18 Q. That's the period before the Asylum IFR  
19 went into effect. Correct?

20 A. Those are all the available data  
21 published by DHS. They haven't published the data  
22 for 2022 or they had not when I last looked at it,

1 which was a few weeks ago.

2 Q. So you were projecting forward that the  
3 stability continued?

4 A. My charge was not to investigate every  
5 hypothetical force that could hypothetically have  
6 affected illegal migration. My charge was to assess  
7 whether there is evidence in the data that the Asylum  
8 Processing IFR of 2022 caused an increase in illegal  
9 migration, and the interdiction effectiveness rate  
10 has been highly stable over time and I don't have a  
11 reason to think that it suddenly changed in June of  
12 2022. No.

13 Q. But if someone testified that the  
14 effectiveness data did change, you would have no  
15 basis one way or another to comment on that?

16 MS. FUDIM: Objection.

17 You can answer.

18 THE WITNESS: If I learned new information, I  
19 would consider that new information.

20 BY MR. ST. JOHN:

21 Q. Do you know if the number of got-aways  
22 has been trending up, stable, or down?

1           A.       Got-aways as a fraction of -- well, I  
2   don't know the -- I don't recall the technical term  
3   that DHS uses in the publication for detected  
4   migrants plus got-aways. There's some collective  
5   term.

6           So I need to backtrack. I don't know what  
7   that term is.

8           The interdiction effectiveness rate, which is  
9   one minus the percentage of got-aways, is highly  
10   stable over time, suggesting that the fraction of  
11   got-aways is also highly stable over time, and that  
12   makes the analysis of detected illegal migrants  
13   highly informative for this purpose for two reasons.

14          One is what I mentioned before, which is that  
15   numbers that are in fixed proportion to each other,  
16   even when one of them is not observed, are  
17   mathematically required to change in percentage terms  
18   that are identical, that is a percentage change in  
19   one must be reflected by an identical change in the  
20   other.

21          The second is that the complaint that I was  
22   asked to assess makes claims about the effectiveness

1 of the Asylum Processing IFR specifically on detected  
2 illegal migrants and, separately, on undetected  
3 illegal migrants.

4 So it is highly relevant for both of those  
5 reasons to test the effect on detected illegal  
6 migrants.

7 Q. Do you know how many encounters there  
8 were at the southwest border in Fiscal Year 2023?

9 A. To date, it's been running something  
10 like 2.4 million in 2022 and I believe, but I'm not  
11 sure, it's been a little bit higher this year on a  
12 monthly basis. So I would have to make a  
13 back-of-the-envelope calculation. I don't know the  
14 number off the top of my head.

15 Q. FY 2023 is closed, by the way, at the  
16 end at the end of October.

17 A. The last time I looked at the data, the  
18 full data had not been published. So I'm not aware  
19 of the full data.

20 Q. How many encounters nationwide?

21 A. I did not look at nationwide encounters  
22 for my analysis. I focused on the southwest border.



1 Q. Do you know how many encounters there  
2 were nationwide in FY 2023?

3 A. I do not know. I have not looked at FY  
4 2023 data since you say it's been published.

5 Q. Do you know how many got-aways there  
6 were in FY 2023?

7 A. I don't have a reason to think that the  
8 interdiction effectiveness rate and, therefore, the  
9 got-away rates changed in 2022 or 2023 that would  
10 affect my analysis.

11 Q. 600,000 got-aways, does that sound about  
12 right?

13 MS. FUDIM: Objection.

14 You can answer.

15 THE WITNESS: I -- I'm aware that DHS has  
16 published the interdiction effectiveness rate, which  
17 is implicitly a measure of the got-away rate, for FY  
18 2014 through FY 2021, the last time that I checked,  
19 which was a few weeks ago. Since then, they might  
20 have published for 2022.

21 I'm not aware of any public information about  
22 2023.

1 BY MR. ST. JOHN:

2 Q. Policy-wise, did anything big happen in  
3 January 2021, January and February of 2021?

4 A. "Policy-wise", I don't know what that  
5 means.

6 Q. Was there any big policy changes or  
7 leadership changes in January and February 2021?

8 MS. FUDIM: Objection, vague.

9 You can answer.

10 THE WITNESS: At the national level, I  
11 believe that January 2021 was the inauguration of the  
12 Biden Administration.

13 BY MR. ST. JOHN:

14 Q. And are you familiar with what happened  
15 here to defendants in February of 2021?

16 MS. FUDIM: Objection, vague.

17 You can answer.

18 THE WITNESS: I don't understand the meaning  
19 of "what happened".

20 BY MR. ST. JOHN:

21 Q. A new Secretary of Homeland Security?  
22 Are you aware of when the Biden Administration's

1 Secretary of Homeland Security took office?

2 A. I don't know the date that the Homeland  
3 Security Secretary took office, no.

4 Q. February of 2021.

5 MS. FUDIM: Objection. Is there a question  
6 pending?

7 BY MR. ST. JOHN:

8 Q. Federal policy doesn't or tends to not  
9 to turn on a dime. Right?

10 MS. FUDIM: Objection, vague.

11 THE WITNESS: I don't know what turning on a  
12 dime means and I don't know what federal policy  
13 you're referring to.

14 BY MR. ST. JOHN:

15 Q. The Federal Government is big. Right?  
16 Millions of employees?

17 A. I don't know how many federal employees  
18 there are.

19 Q. Sir, you've got degrees from Harvard, a  
20 Ph.D., and you can't give me a simple yes or no to  
21 whether the Federal Government is big?

22 A. You said millions of employees and I'm

1 not aware of that number. So I couldn't testify to a  
2 number that I don't know.

3 My understanding is that it's the largest  
4 employer in the United States. So by that criteria,  
5 you know, big -- you suggested a criteria, big, that  
6 I don't have information about. So I said I don't  
7 know.

8 Q. Thousands of pages of regulations.  
9 Right?

10 A. I don't know how many pages of  
11 regulation there are.

12 Q. A lot. Would you agree with that?  
13 most citizens would say, Hey, you can look at  
14 the U.S. Code and statutes alone, it's a lot of shelf  
15 space.

16 A. I don't know.

17 MS. FUDIM: Objection to form.

18 THE WITNESS: I don't know what lots means,  
19 but I guess it would be reasonable to say there are  
20 lots of regulation at the federal level.

21 BY MR. ST. JOHN:

22 Q. And it takes time to change regulations.

1 Right?

2 A. I'm sure it would depend on the  
3 regulation.

4 Q. So you don't know whether it takes weeks  
5 or months to change a regulation?

6 A. I'm certain that it depends on the  
7 regulation.

8 Q. When a new administration takes office,  
9 it takes time for its policies to be implemented;  
10 would you agree with that?

11 A. It depends on the policy.

12 Q. It can take months?

13 A. Depending on the policy, perhaps. I  
14 don't know what policy --

15 Q. You just don't know one way or the  
16 other?

17 A. You're talking about policies. A policy  
18 could mean a declaration of war. I don't know what  
19 policy you're referring to.

20 Q. Changing an immigration regulation could  
21 take months. Right?

22 A. I don't have expertise in any legal

1 matter and certainly not how long it takes to  
2 implement a rule in the U.S. Government.

3 Q. Changing departmental organizations can  
4 take months. Right?

5 A. I have no expertise in departmental  
6 reorganization in the Federal Government.

7 Q. Sir, you have no expertise one way or  
8 another whether it could take eight or ten months to  
9 implement policies. Correct?

10 A. I don't know what policies means in this  
11 context.

12 Q. A change in border policies, it could  
13 take months.

14 It could. You just don't know one way or  
15 another. Right?

16 A. Whether it must take months to implement  
17 any given change in border policy that is  
18 conceivable, I don't know that. I don't have  
19 expertise on that and it doesn't sound plausible to  
20 me.

21 Q. It doesn't sound plausible that it could  
22 take months to change an immigration regulation?

1           A.       I said "must". You're saying could it,  
2       hypothetically, take months to implement any  
3       hypothetical regulation at the U.S. border. I  
4       imagine that it could take months, hypothetically,  
5       for any given policy.

6           Q.       Migration flows change over time; you  
7       would agree with that, wouldn't you?

8           A.       Migration flows certainly change over  
9       time, yeah.

10          Q.       Both in quantity and in origin.  
11       Correct?

12          A.       Migration flows to the United States  
13       have changed over time and country of origin in  
14       recent years. Yes.

15          Q.       Does the southwest border encounter data  
16       you rely on include maritime encounters?

17          A.       It does not. My understanding is that  
18       the database includes all inadmissible migrants  
19       encountered at the southwest land border in the U.S.

20          Q.       So I looked at the website, Defendant's  
21       website, for the encounter data and it says, quote:  
22       Encounter data includes U.S. Border Patrol Title 8

1 apprehension, Office of Field Operations Title 8  
2 inadmissibles, and Title 42 expulsions -- there's an  
3 asterisk -- "for Fiscal Years 2020, 2021, 2022, 2023.  
4 The data is available for the northern land border,  
5 southwest land border, and nationwide, i.e., air,  
6 land, and sea modes of transportation encounters."

7 Why southwest land border rather than  
8 nationwide? Why did you analyze southwest land  
9 border encounters rather than nationwide encounters?

10 A. I don't have the complaint in front of  
11 me, but my recollection was that was clearly the most  
12 relevant form of illegal migration that was being  
13 referred to in my -- in the statements of fact that I  
14 was asked to evaluate.

15 Q. Why don't we turn to page 2 of your  
16 report, Exhibit 4.

17 A. Page 2.

18 Q. And in paragraph 7, you quote what you  
19 were asked to assess.

20 A. I need a Kleenex. Does there happen to  
21 be one?

22 I apologize. I don't mean to interrupt you.



1 It's just I don't have a Kleenex with me.

2 Q. Because a question is pending, I'm going  
3 to have to insist you answer.

4 A. Okay.

5 MR. ST. JOHN: No. We can take a pause.

6 MS. FUDIM: I'll remain in the room and he  
7 can go grab a Kleenex.

8 VIDEOGRAPHER: Off the record. The time is  
9 10:53 [sic].

10 [Recess.]

11 VIDEOGRAPHER: On the record. The time is  
12 11:53.

13 MR. ST. JOHN: And for the record, we did not  
14 take a one-hour break.

15 MS. FUDIM: No.

16 BY MR. ST. JOHN:

17 Q. Mr. Clemens, we were referencing page 2,  
18 paragraph 7 of your complaint.

19 A. Yes.

20 Q. Paragraph 7 of your report, I should  
21 say, which quotes from the complaint.

22 The relevant passages of the complaint that

1 you were asked to assess read as follows in a block  
2 quote. Does it say southwest border anywhere in  
3 there?

4 A. Those passages can only be interpreted  
5 in the context of the whole complaint text.

6 Q. Sir, you're that one that identified the  
7 relevant passages. Correct?

8 It's your work.

9 A. The meaning of these passages can only  
10 been interpreted in the context of the whole  
11 complaint.

12 Q. Sir, did you start with the caption of  
13 the complaint?

14 A. I don't know what "caption of the  
15 complaint" means.

16 Q. Front page, upper left-hand corner, a  
17 list of who the parties are. We went through this  
18 earlier, the State of Louisiana, State of Florida.

19 What makes you think the southwest border is  
20 the most relevant?

21 A. I did not study southwest border  
22 encounters relative to nationwide encounters for the

1 purposes of this analysis, but my general familiarity  
2 with the data suggests that the large majority of  
3 unauthorized migrants present in the collection of  
4 states that brought this lawsuit arrived at the  
5 southwest land border.

6 Q. Including Florida?

7 A. I'm talking about them collectively.

8 Q. I'm talking about Florida specifically.

9 A. I was not asked to assess the claims of  
10 effect only in the portion about Florida. I was  
11 asked to assess the broad claim of fact in the  
12 portion of the complaint that speaks to that group of  
13 states collectively.

14 Q. The broad claim of fact would be  
15 nationwide, wouldn't it?

16 Because I don't see southwest border in the  
17 paragraphs you've excerpted on page 2.

18 A. I don't have the complaint in front of  
19 me, but it was my recollection from the complaint  
20 that the language in the complaint makes it clear  
21 that they are talking about a group of people who, by  
22 far, principally arrive in the United States via the

1 southwest border.

2 Q. Did you independently choose what you  
3 were going to analyze or did the Federal Government  
4 ask you to analyze this specific subset, the  
5 southwest border?

6 A. I independently chose it and I'm not a  
7 legal expert, but my recollection is that the Asylum  
8 Processing IFR changed responsibility for who  
9 adjudicates asylum claims for migrants encountered at  
10 the border. I'm not a hundred percent sure of the  
11 details of the Asylum Processing IFR, but that's my  
12 recollection of the text.

13 So the adjudication of an asylum claim by a  
14 person encountered in the interior in my nonlegal  
15 expert understanding of the rule wasn't changed by  
16 the rule.

17 Q. What about somebody encountered at the  
18 northern border? That's thousands of miles, isn't  
19 it?

20 A. My -- I did not look at nationwide  
21 encounters versus southwest borders encounters in my  
22 analysis, but my clear understanding and familiarity

1 with this data is that the vast majority of  
2 unauthorized migrants that are relevant to the  
3 population discussed in the complaint arrive at the  
4 southwest border, making data on the southwest border  
5 highly, highly relevant.

6 Q. What's the relevant population in your  
7 view?

8 A. The complaint states several times and  
9 using different language -- I don't have it in front  
10 of me -- that the Asylum Processing IFR of 2022  
11 causes an influx at the border, a surge to the  
12 border. I think it would be strange and unjustified  
13 to believe that they were referring primarily to the  
14 Canadian border.

15 Q. You used May 31, 2022 as your before and  
16 after date for your analysis; is that correct?

17 A. May 31, 2022 is the date that, in my  
18 understanding, the Asylum Processing IFR became  
19 effective. Yes.

20 Q. So your understanding is that from that  
21 point forward, all asylum applicants were, at least  
22 those who were encountered at the border were,

1 eligible for processing under the asylum rule?

2 MS. FUDIM: Objection.

3 THE WITNESS: I'm not a legal expert and I  
4 don't have a detailed understanding of what the  
5 asylum -- of exactly which migrants were necessarily  
6 affected by the Asylum Processing IFR. You said all  
7 and I don't have a reason to believe that all of them  
8 were.

9 BY MR. ST. JOHN:

10 Q. Well, so how -- just imagine,  
11 hypothetically, it's a special rule and it only  
12 applies to two asylum applicants. The Federal  
13 Government could do that, as a rule say when Joe  
14 Smith and Ted Frank apply for asylum, they will be  
15 subject to this special rule.

16 That special rule wouldn't be likely to impact  
17 the migration flow of people not subject to it.  
18 Right?

19 MS. FUDIM: Objection to form.

20 You can answer.

21 THE WITNESS: I didn't look at hypothetical  
22 rules for this case. I assessed whether there was

1 evidence that the real Asylum Processing IFR of 2022  
2 caused an increase in illegal migration, not any  
3 other policy and not any hypothetical policy.

4 BY MR. ST. JOHN:

5 Q. I am entitled to ask you about  
6 hypotheticals, sir, and I'm asking you about a  
7 hypothetical.

8 My hypothetical is if the Asylum IFR applied  
9 to two named individuals, when and if Joe Smith and  
10 Ted Frank applied for asylum, they will be subject to  
11 a special rule. That special rule is not going to  
12 impact the migration behavior of anyone else.  
13 Correct?

14 A. I didn't study this hypothetical policy  
15 and I don't think I could form a carefully considered  
16 opinion about it sitting here. If you're asking me  
17 whether people's behavior who are exempt from a rule  
18 would be affected by that rule, then I would  
19 certainly need additional evidence to believe that it  
20 would be; but prima facie, I would believe that  
21 people who are exempt from a rule, I would not  
22 hypothetically know a mechanism by which people

1 exempt from a rule would have their behavior affected  
2 by the rule that they are exempt from.

3 MS. FUDIM: Just for a question, and I'm not  
4 pressuring you to go at any particular pace, but it's  
5 twelve o'clock now. So if you think you're going to  
6 go for a couple more hours, I would ask for a  
7 30-minute lunch break. If you think you've got like  
8 another hour or so, then I think it makes sense to  
9 carry on, but if you anticipate more than that, then  
10 maybe a lunch break would be appropriate.

11 MR. ST. JOHN: Let me finish up this section.  
12 Depending on how it goes, we've got five or ten more  
13 minutes, and then we can take a break.

14 Does that work for everybody?

15 MS. FUDIM: That's fine. Yeah, yeah, yeah.  
16 I'm not suggesting we have to take a break. I just  
17 -- you know, if we're going to go to two o'clock, I'm  
18 going to need to eat before then. If we're going to  
19 go to one, I can hold off.

20 MR. ST. JOHN: The record, I hope did not  
21 reflect my stomach letting everyone know that it was  
22 lunchtime. So it does now.



1 BY MR. ST. JOHN:

2 Q. In your analysis, did you consider  
3 changes in economic conditions in the United States  
4 and whether that could have been a confounding  
5 variable in migration behavior?

6 A. I considered changes in economic  
7 conditions in the United States by two different  
8 methods, yes.

9 Q. Which two methods?

10 A. One is in the second test that I ran.  
11 Using the ARIMA model, I include a measure of  
12 unemployment in the United States, and in the third  
13 test that I ran, I include a control group that would  
14 be affected by economic conditions in the United  
15 States.

16 Q. The unemployment rate you considered was  
17 Hispanic unemployment; is that correct?

18 A. It's called the Hispanic Latino  
19 unemployment rate published by BLS. Yes.

20 Q. Does that unemployment rate include  
21 illegal aliens?

22 A. The unemployment rate is calculated

1 based on the current population survey and the  
2 current population survey does not ask legal status.  
3 So it's not possible to know; however, illegal aliens  
4 are not excluded from the current population survey.  
5 So I would expect it to include some of them.

6 Q. So this is an example where other  
7 policies could impact the statistic. If there were a  
8 crackdown, for example, on employment of illegal  
9 aliens, you would expect the Hispanic Latino  
10 unemployment rate to rise; is that correct?

11 MS. FUDIM: Objection.

12 You can answer.

13 THE WITNESS: It would depend on what the  
14 crackdown did. So I don't know how to answer that  
15 question.

16 BY MR. ST. JOHN:

17 Q. If there were a nationwide crackdown on  
18 employers of illegal aliens, the Federal Government  
19 is going to bust down your door and shut down your  
20 business and you may go to jail or at least get a big  
21 fine, that would tend to increase Hispanic Latino  
22 unemployment?

1 A. Not necessarily.

2 Q. Why not?

3 A. The unemployment rate is calculated  
4 using answers to questions in the current population  
5 survey. Broadly, those questions are asking people  
6 if they are seeking employment, but not able to find  
7 employment. In order to be included in the  
8 unemployment statistics, you need to be present to  
9 answer the current population survey.

10 So if the crackdown resulted in, for example,  
11 less employment of Hispanics and Latinos, but no  
12 departures of them, then it could possibly go up. If  
13 the crackdown resulted in departures of unauthorized  
14 migrants from the country, then there would be fewer  
15 people to answer the current population survey and  
16 the rate could go down and there could be other  
17 impacts that I can't think of right now.

18 So it would be --

19 Q. The complex confluence -- you've got a  
20 confounding variable in itself that is a complex  
21 confluence of factors; is that correct?

22 A. I gave you two examples of how it might

1 be affected and I can't guarantee that I'm thinking  
2 of all of the ways it could be affected, but it's not  
3 obvious that it would go up or down.

4 Q. Other than the Hispanic Latino  
5 unemployment rate, did you consider any other  
6 confidentially confounding variables in your  
7 analysis?

8 MS. FUDIM: Objection to form.

9 You can answer.

10 THE WITNESS: The third test that I ran is  
11 designed to incorporate the effects of any other  
12 incentive on migration, on the illegal migration,  
13 that could have changed around the same time of the  
14 policy.

15 MR. ST. JOHN: Why don't we take a break for  
16 lunch.

17 MS. FUDIM: Great. How long would you like  
18 to take?

19 VIDEOGRAPHER: Off the record. The time is  
20 12:07.

21 [Whereupon, at 12:07 p.m., a lunch recess was  
22 taken, to reconvene at 12:45 this same day.]

1 A F T E R N O O N S E S S I O N

2 VIDEOGRAPHER: On the record. The time is  
3 12:54.

4 FURTHER EXAMINATION BY COUNSEL FOR PLAINTIFFS  
5 BY MR. ST. JOHN:

6 Q. Welcome back, Mr. Clemens.

7 A. Thank you.

8 Q. You understand you're still under oath?

9 A. Yes.

10 Q. Looking at your report, you analyzed  
11 border encounters and that was it. Right?

12 Just border encounters, some subcategories,  
13 but it was just border encounters; is that correct?

14 A. In all three tests that I ran, the  
15 outcome on which I evaluate the evidence for the  
16 effect of the Asylum Processing IFR is encounters  
17 with inadmissible migrants published by CPB. Yes.

18 Q. You did not look at the number of asylum  
19 claims. Correct?

20 A. The factual claim I was asked to assess  
21 was not about asylum claims. It was about illegal  
22 migration.

1 So, no, I did not.

2 Q. So you don't know one way or another  
3 whether asylum claims increased or decreased after  
4 May 2022?

5 A. The factual claim in the complaint that  
6 I was asked to assess was not about asylum claims.  
7 Therefore, I didn't look at it when assessing that  
8 claim.

9 Q. So you have no opinion about whether the  
10 number of asylum claims increased or decreased after  
11 May 2022?

12 A. The factual claim in the complaint that  
13 I was asked to assess regarded statements about a,  
14 quote, influx of migrants at the border, unquote, and  
15 other similar phrasing that could include people who  
16 claim asylum and people who don't claim asylum. So  
17 it would be -- it would not be appropriate to  
18 evaluate those claims using data on asylum claims  
19 alone.

20 So, no, I didn't.

21 Q. You didn't offer any opinions about the  
22 number of asylum claims and whether they increased or

1 decreased?

2 A. I was not asked to look at that and I  
3 did not look at that.

4 Q. As a first step -- well, strike that.

5 As a, quote, first step in testing the rules  
6 affecting border encounters, end quote, you, quote,  
7 simply checked whether the volume of migrants  
8 encountered rose after the rule went into effect on  
9 May 31, 2022, end quote. Correct?

10 A. I conducted three tests of whether the  
11 evidence is compatible or whether there is evidence  
12 of a positive effect on illegal migration from the  
13 Asylum Processing IFR and that is the beginning of  
14 the description of one of them. Yes.

15 Q. As a first step, you simply checked  
16 whether the volume of migrants encountered rose after  
17 the rule went into effect?

18 This is a yes or no question.

19 A. That's not a full description of the  
20 test that I ran. So it can't be answered yes or no.  
21 That is partial description of the first test that I  
22 ran. Yes.

1 Q. Mr. Clemens, can you turn paragraph 17  
2 of your report. Can you read the first sentence of  
3 paragraph 17.

4 A. "A first step in testing for the rule's  
5 effect on border encounters is simply to check  
6 whether the volume of migrants encountered rose after  
7 the rule went into effect on May 31, 2022?

8 Q. Mr. Clemens, is that what you did?

9 A. That is a partial description of what I  
10 did. There are many sentences to follow.

11 Q. You wouldn't do something useless and  
12 put it in your report; is that correct?

13 A. Did I include a description of useless  
14 things in my report? I don't understand that  
15 question.

16 Q. The Federal Government paid you a lot of  
17 money for this report and I'm trusting you would not  
18 put something that's completely useless in that  
19 report. You would not have performed a useless  
20 analysis?

21 A. All three tests that I run are useful.

22 Q. So is it your opinion that a simple



1 before and after count can provide at least some  
2 insight?

3 A. The force of these tests comes from  
4 running all of them together and not from any one of  
5 them in isolation.

6 Q. So each test, standing alone, is not  
7 sufficiently probative; you're relying on all three  
8 together?

9 A. I included in the report the most  
10 appropriate tests and all of them are collectively  
11 informative.

12 Q. So would any one test be sufficiently  
13 informative?

14 MS. FUDIM: Objection to form, vague.

15 BY MR. ST. JOHN:

16 Q. Allow me to rephrase.

17 You ran three tests. Would any one of those  
18 tests that you ran, standing alone, be sufficiently  
19 informative?

20 A. I conclude that they're -- that I did  
21 not find substantial evidence of a positive effect of  
22 the Asylum Processing IFR on illegal migration. What

1 I mean by substantial there is that I did not find in  
2 any of the tests evidence to support the conjecture  
3 of a positive effect.

4 If I had found evidence of a positive effect  
5 in any of the three, that would have been  
6 informative. So in that sense, the result of one of  
7 the tests could have been important, but what is  
8 crucial to my conclusion is that in none of three  
9 tests was a positive effect detected.

10 Q. I suppose your first step was a simple  
11 before and after. Your next step was to use that,  
12 quote, ARIMA model, end quote, to, quote, check  
13 whether advent of the rule was followed by a rise in  
14 the volume of border encounters relative to the trend  
15 that would have been expected, end quote.

16 Is that a summary of what you did for the  
17 second step?

18 MS. FUDIM: Objection to form.

19 You can answer.

20 THE WITNESS: I don't think those sentences  
21 alone are a helpful summary what I did. What I did  
22 was used a -- in the first and second tests, I used

1 two different versions of a very well-established and  
2 peer-reviewed method for assessing the effect of a  
3 policy in a univariant time series that is a variable  
4 that is observed without any other variables over  
5 time, and I did both of those because each of them  
6 involves different tradeoffs.

7 In this case, one of them is more  
8 transparent, but less rigorous. The other is much  
9 more rigorous, but much less transparent, and I  
10 thought it was important to test both of them.

11 BY MR. ST. JOHN:

12 Q. Turn to page 6 of your report, paragraph  
13 21. Can you read the first sentence, sir.

14 A. "The next step is to check whether the  
15 advent of the rule was followed by a rise in the  
16 volume of border encounters relative to the trend  
17 that would have been expected given typical unrelated  
18 trends in border encounters."

19 Q. That's your topic sentence. Right?

20 A. I don't know what "topic sentence"  
21 means. That's the first sentence of paragraph 21.

22 Q. Sir, did you go to middle school?

1 A. Excuse me?

2 Q. Did you go to middle school, sir?

3 MS. FUDIM: Objection.

4 THE WITNESS: I went to an intermediate  
5 school, if that's what you mean by middle school.

6 BY MR. ST. JOHN:

7 Q. You took English. Right?

8 A. I studied English in intermediate  
9 school, yes.

10 Q. And probably later on in like high  
11 school, college?

12 A. I did not study English in college.

13 Q. Do you know what a topic sentence is?

14 A. I said it was the first paragraph --  
15 first sentence of that paragraph. I'm not a  
16 grammarian and I don't remember what a topic sentence  
17 is now.

18 Q. Those are your words. Right?

19 "The next step is to check whether the advent  
20 of the rule was followed by a rise in the volume of  
21 border encounters relative to the trend that would  
22 have been expected given typical unrelated trends in

1 border encounters."

2 A. That's a very rough description for  
3 nontechnical specialists of what the ARIMA model is  
4 doing. Yes.

5 Q. And in paragraph 22, you talk about what  
6 makes the use of an ARIMA model appropriate, and it's  
7 the end of the fifth line of paragraph 22, the  
8 sentence beginning with "They are appropriate".

9 Can you read that sentence, sir.

10 A. "They are appropriate for studying  
11 time-varying quantities that, one, mostly exhibit  
12 smooth changes rather than erratic unpredictable  
13 jumps; two, exhibit some inertia so that unexpected  
14 changes affect future values; and, three, drift  
15 systematically upward or downward over time rather  
16 than always reverting to the same level."

17 Q. That's your description of when an ARIMA  
18 model is appropriate. Correct?

19 A. That's correct.

20 Q. How is "mostly smooth" defined?

21 Mostly smooth -- strike that.

22 How is "smooth changes" defined?

1           A.       Intuitively, if the evolution of border  
2       encounters over time looked like the output of a  
3       seismograph, going erratically, unpredictably from  
4       huge positive swings in one period to huge negative  
5       swings in another period over and over and over  
6       again, then that is a time series that I would expect  
7       to -- whose features I would not expect the ARIMA  
8       model to capture a great deal of information about.

9           Q.       Is there any generally-recognized test  
10      for smooth versus erratic and unpredictable?

11          A.       The test of -- the most common test for  
12      the information captured by the ARIMA model is its  
13      ability to make out-of-sample predictions based on  
14      training data, which is the test that I carry out.

15          Q.       That's the result. My question is about  
16      the data.

17                 Is there any generally-recognized test for  
18      whether that data is smooth versus erratic and  
19      unpredictable?

20          A.       That is what I just said. If the data  
21      did not exhibit these characteristics, then the ARIMA  
22      model would capture less information about it and its

1 out-of-sample predictions would be less and less  
2 likely to correspond to reality.

3 Q. So there's no -- your testimony is  
4 there's no generally-recognized test on the data to  
5 determine whether application of an ARIMA model is  
6 appropriate; you, instead, look at the results of the  
7 ARIMA model and say, Okay, the results seem to track  
8 the real world; so, ergo, the data was appropriate?

9 MS. FUDIM: Objection to form.

10 THE WITNESS: That's an incorrect statement.

11 BY MR. ST. JOHN:

12 Q. So what is the test?

13 You don't know what the result is going to be.  
14 You have not run the ARIMA model yet. What is the  
15 test for whether the data -- or is there a test for  
16 whether the data you're looking at is sufficiently  
17 smooth versus erratic and unpredictable?

18 A. I described to you the test exactly as  
19 it is most commonly done. The most common test is to  
20 fit the ARIMA model to the data and assess whether it  
21 makes out-of-sample predictions in a way that is  
22 reliable, which is the test that I run. That is a

1 test on the data.

2 Q. So without running an ARIMA model,  
3 without running the model or an ARIMA model on a data  
4 series, you can't evaluate ex ante whether  
5 application of the ARIMA model is appropriate?

6 A. Could I guess without running the ARIMA  
7 model what the ARIMA model would predict?

8 Certainly, I could not, which is why I do run  
9 the ARIMA model.

10 Q. Well, it's not just what the ARIMA model  
11 would predict. Your testimony, your words, is the  
12 ARIMA model is appropriate for studying time-varying  
13 quantities that have certain characteristics. Right?

14 A. Um-hum.

15 Q. Is that a yes?

16 A. Sorry. Yes.

17 Q. Without running the ARIMA model, how do  
18 you determine whether those time-varying quantities  
19 have characteristics that render an ARIMA model  
20 appropriate?

21 A. I don't know how to explain this to you  
22 more clearly than I've explained to you. The test



1 that is most commonly used to see whether the ARIMA  
2 model is capturing information about the data, which  
3 it would best under these circumstances, is to  
4 conduct out-of-sample -- is to compare out-of-sample  
5 predictions to the truth, which is exactly what I do,  
6 and that's the most well-accepted established method  
7 of testing whether the ARIMA model is appropriate.

8 Q. So the test for the model is to see if  
9 the results of model match some subsequent  
10 known-to-be-true data series?

11 A. The most common test for the information  
12 captured -- the most common test for the reliability  
13 of the information captured by the ARIMA model is to  
14 compare its ability to make out-of-sample predictions  
15 to reality. Yes.

16 Q. I've got a data series of a thousand  
17 data points. There's no way for me to look at that  
18 and say, Hmm, an ARIMA model would be appropriate for  
19 studying this time-varying data series without  
20 running the ARIMA model?

21 A. There's a test called a unit root test  
22 that is an independent test of whether or not the

1 time series exhibits integration which makes a  
2 certain way of treating the "I" part of ARIMA, which  
3 stands for integrated or integration, but the way to  
4 test the other parts, auto-regressive, A-R, and  
5 moving average, M-A, the way to test whether the  
6 model is capturing information about the time series  
7 that is informative is to make out-of-sample  
8 predictions with that model and compare them to  
9 reality.

10 Q. Over a limited "X" -- you understand "X"  
11 and "Y" if we're talking about a graph. Right?

12 You have an independent and a dependent  
13 variable.

14 A. You mean "X" to be the independent  
15 variable and "Y" to the dependent variable.

16 Q. So here, the independent variable would  
17 be time and then you've got a dependent variable and  
18 that's why you're running the ARIMA model and that's  
19 your time-varying series. Correct?

20 A. There are -- the ARIMA equation includes  
21 -- the dependent variable in the ARIMA regression  
22 equation is not time. If you mean the graphs in the

1 reports, the X Axis in those graphs, in many of them,  
2 if not all of them, is time.

3 Q. You said time varying. So that implies  
4 that you've got some variable that varies with time.  
5 Right?

6 A. As they do in the figures, yes.

7 Q. Time is the independent variable and  
8 you've got a dependent variable?

9 A. Not in the ARIMA model. That's not a  
10 correct statement of what the equation is, but I  
11 don't -- I should let you finish the question.

12 Q. I can -- correct me if I'm wrong. I can  
13 generate any curve I choose by summing a sufficient  
14 number of sign waves. Right?

15 A. Can you generate any curve by summing a  
16 sufficient number of sign waves? You're asking a  
17 question about mathematics in general?

18 I don't understand this question.

19 Q. Well, you're saying that this has  
20 predictive value, and over a finite interval, I can  
21 generate any shape I want by summing a sufficient  
22 number of sign waves; isn't that correct?

1           A.       I'm not a specialist in the mathematics  
2 of Fourier compositions, but I -- that may or may not  
3 be a true statement. I certainly didn't look at it  
4 for this report, which has nothing to do with what  
5 you're talking about.

6           Q.       Well, you can generate any curve you  
7 want by summing sign waves, a sufficient number of  
8 sign waves, and then as you move away from the curve  
9 that you created or the interval that you've looked  
10 at, the curve you created is more likely to depart  
11 from reality?

12          A.       My analysis has nothing to do with sign  
13 waves and I don't understand what you're talking  
14 about.

15          Q.       Well, sir, here's the problem: What I  
16 understand your testimony is is the way I figure out  
17 if the data is appropriate for studying within an  
18 ARIMA model is to run the ARIMA model and see if the  
19 ARIMA model fits reality over some narrow interval in  
20 the future.

21          A.       It is not a narrow interval. So that's  
22 not a correct statement, but it is a -- checking the

1 out-of-sample predictions of the model is the most  
2 accepted way of checking whether the ARIMA model is  
3 capturing information about the time series.

4 Q. So this is an easy yes or no question:  
5 Do you have a way to look a time-varying data series  
6 without running the ARIMA model and telling whether  
7 an ARIMA model is appropriate for that time-varying  
8 data series?

9 A. Is there a way without doing statistical  
10 analysis to guess the outcome of statistical  
11 analysis?

12 Q. Not outcome. Whether it's appropriate  
13 for that statistical analysis.

14 MS. FUDIM: Objection, vague as to the word  
15 "appropriate".

16 You can answer.

17 THE WITNESS: My charge in this case was not  
18 to guess whether the ARIMA model would capture  
19 information about the time series. I demonstrate  
20 that the ARIMA captures information about the time  
21 series.

22 So I don't know of a way to guess by looking

1 at the data, hypothetically, what the outcome of  
2 applying the ARIMA model would be.

3 BY MR. ST. JOHN:

4 Q. Sir, you don't know how to test a  
5 time-varying data series to determine whether an  
6 ARIMA model is appropriate without running the ARIMA  
7 model?

8 A. I don't understand this question. I've  
9 told you the way it is most accepted to be done in my  
10 discipline and you're asking me if I know how to do  
11 it in a way which is not the best way to do it. I  
12 don't know how to do it in a way that is not the best  
13 way to do it. I do it in the way that is the best  
14 way to do it in my discipline.

15 Q. There is no -- your testimony here  
16 today, sir, is that if you're presented with a  
17 time-varying data series, you are unable to determine  
18 whether an ARIMA model is appropriate for that data  
19 series?

20 A. That's the opposite what I said. That  
21 is not true.

22 Q. Without running an ARIMA model?

1           A.       It is not possible to guess the outcome  
2   of an application of a statistical tool without  
3   applying it.

4           Q.       The question is whether the application  
5   of that statistical tool is appropriate. That's the  
6   question.

7           A.       I demonstrate that it is.

8           Q.       By applying the statistical tool?

9           A.       That is the very well-accepted way of  
10   assessing the informativeness of the ARIMA model in  
11   my discipline.

12          Q.       Are you familiar with the term "circular  
13   logic", sir?

14          MS. FUDIM:   Objection.

15          THE WITNESS:   I don't know what you mean by  
16   it, but I --

17   BY MR. ST. JOHN:

18          Q.       What do you mean? When you hear the  
19   words "circular logic", what do you understand those  
20   words to mean?

21          A.       Circular reasoning would be a deduction  
22   that assumes its own premises.

1 Q. Isn't that what you're offering; the way  
2 I determine if an ARIMA model is appropriate for a  
3 data series is to run the ARIMA model on the data  
4 series?

5 A. That is not circular at all.

6 Q. Because it generates some kind of output  
7 and that output, in your view, sufficiently matches  
8 other data over some interval?

9 MS. FUDIM: Objection to form.

10 THE WITNESS: This view comes from my  
11 training in econometrics at Harvard University. It  
12 comes from 21 years of research in applied economics  
13 that is peer reviewed.

14 It is not my view of how the usefulness and  
15 informativeness of the ARIMA model is checked. I'm  
16 describing to you the very widely-accepted and  
17 well-established and peer-reviewed method for  
18 checking an ARIMA model that is used in my  
19 discipline.

20 BY MR. ST. JOHN:

21 Q. Without running an ARIMA model on a  
22 dataset, are you able to reliably determine whether



1 application of an ARIMA model is appropriate to that  
2 time-varying dataset?

3 MS. FUDIM: Objection, asked and answered.

4 THE WITNESS: If by "appropriate", you mean  
5 useful and informative, I will tell you again that,  
6 by far, the most accepted method of checking the  
7 informativeness and usefulness of an ARIMA model is  
8 testing its ability to make out-of-sample  
9 predictions.

10 BY MR. ST. JOHN:

11 Q. That's a different question, sir.  
12 That's a different question.

13 So I'm, once again, going to ask you to answer  
14 the question asked, and the question asked is without  
15 running an ARIMA model, are you able to look at a  
16 time-varying data series and determine whether  
17 application of an ARIMA model to that data series is  
18 appropriate?

19 MS. FUDIM: Objection, asked and answered.

20 BY MR. ST. JOHN:

21 Q. It's a yes or no. It's a yes or no,  
22 sir.

1           A.       It is not yes or no, because I don't  
2 know what you mean by appropriate. I offered an  
3 answer in which I said I defined appropriate as  
4 useful and informative, and I'm telling you again  
5 that the most accepted way of assessing the  
6 informativeness and usefulness of an ARIMA model is  
7 to check its ability to make out-of-sample  
8 predictions, which is what I do.

9           Q.       There is no accepted way to look at a  
10 time-varying data series and determine whether an  
11 ARIMA model is, quote, appropriate for studying the  
12 time-varying, end quote, data series without running  
13 the ARIMA model?

14           MS. FUDIM: Objection, asked and answered.

15           THE WITNESS: I don't know what you mean by  
16 the word "appropriate". If what you mean is useful  
17 and informative, the best accepted way to check that  
18 about a given univariant time series is to check any  
19 given ARIMA model's ability to make out-of-sample  
20 predictions about that time series.

21           BY MR. ST. JOHN:

22           Q.       How close does the out-of-sample

1 prediction have to be? Is there a test for that?

2 A. My charge in this case was not to make a  
3 perfect prediction of --

4 Q. Sir, I'm going to cut you off. I don't  
5 care what your charge was. The question is --

6 Madam Court Reporter, would you read it back.

7 [Whereupon, the pending question was read  
8 back by the court reporter.]

9 THE WITNESS: I was interrupted. So I'll  
10 start again.

11 My charge in this case was not to make a  
12 perfect prediction of counterfactual illegal  
13 migration. My charge in this case was to test  
14 whether there is evidence of a positive effect on  
15 illegal migration from the Asylum Processing IFR of  
16 2022.

17 That does not require doing what you're  
18 asking me. So I did not do that.

19 BY MR. ST. JOHN:

20 Q. Is there a generally accepted tightness  
21 of fit for the prediction for the ARIMA model to be,  
22 your word, "useful"?

1           A.       What I'm asking in the second test that  
2 I run which involves the ARIMA model and the first  
3 test involves a highly simplified ARIMA model is  
4 whether border encounters following the advent of the  
5 Asylum Processing IFR were -- whether there is  
6 evidence that they were greater than how border  
7 encounters would have evolved in the absence of the  
8 policy.

9           That is a fundamentally different thing from  
10 using the ARIMA model to make a prediction about what  
11 the counterfactual would have been. So I did not do  
12 that and it would not be necessary to carry out the  
13 tests that I conduct.

14          Q.       So if after the rule went into effect,  
15 your model was coming out with numbers 50 percent  
16 different than the real data, would the ARIMA model  
17 still be useful as a predictive tool?

18          A.       So what I'm doing in the second test is  
19 asking, after the policy was enacted, were -- did  
20 border encounters evolve in a way that was high  
21 relative to past trends in border encounters as  
22 reflected in their persistence, time trends, inertia,

1 seasonality, and association with labor market  
2 conditions in the U.S. So the answer to that  
3 question was no. They were lower than the trend that  
4 would have been expected based on past patterns in  
5 the data in all of those respects.

6 It is a yes or no question, were they higher  
7 or lower. In fact, they were not higher and I was  
8 testing for whether they would be higher.

9 Q. Sir, I'm entitled to test the  
10 reliability and the application of the ARIMA model to  
11 these facts, and what I've heard so far is you can't  
12 reliably apply the ARIMA model. You can't describe  
13 -- you're unable to testify whether data is  
14 appropriate for an ARIMA model. You've been unable  
15 to testify or refuse to testify whether -- how close  
16 the output for an ARIMA model has to be the real data  
17 to make it useful.

18 So we can stop talking about you what you did.  
19 I'm asking ARIMA models generally. You're claiming  
20 to be an expert in this, sir, and I'm asking you  
21 questions about how to work the model, not about what  
22 you did.

1 So let's focus on that.

2 MS. FUDIM: Objection to everything just  
3 stated on the record.

4 THE WITNESS: You just made several false  
5 statements.

6 BY MR. ST. JOHN:

7 Q. Okay. So what --

8 A. I did not testify that I can't test the  
9 model. I described to you several times how I did  
10 test the model, because that is the most accepted way  
11 of testing the model in my discipline.

12 Q. We're not talking about what you did.  
13 Let's start over and hopefully we can get some  
14 answers.

15 We're talking about ARIMA models generally.  
16 We're not talking about immigration. We're talking  
17 about ARIMA models.

18 Is there a generally accepted way to test a  
19 time-varying data series to see if application of an  
20 ARIMA model is appropriate to that data series  
21 without running an ARIMA model?

22 A. The principal criterion that is widely

1 accepted in my discipline for assessing the  
2 informativeness and usefulness of an ARIMA model is  
3 its ability to make out-of-sample predictions. There  
4 is no way to look at a graph and determine whether or  
5 not an ARIMA model will make reliable out-of-sample  
6 predictions.

7 Q. Okay. You testified, you just  
8 testified, that the generally-accepted way to test an  
9 ARIMA model is its, quote, ability to make  
10 out-of-sample predictions?

11 A. Yes.

12 Q. How close do those predictions have to  
13 be to known true data for the ARIMA model to be  
14 useful?

15 A. It depends on the purpose to which the  
16 ARIMA model is applied. You've specified that we're  
17 speaking generally. So I don't know what useful  
18 means in an abstract context.

19 Q. Is there any generally-accepted test  
20 for, quote, the ability to make out-of-sample  
21 predictions, end quote, a tightness of fit test or  
22 something like that?

1 Is there any generally-accepted test for the  
2 output of an ARIMA model?

3 A. The generally-accepted test is to make  
4 out-of-sample predictions and determine whether those  
5 match reality.

6 Q. How closely do they have to match  
7 reality in order for the model to be useful?

8 A. It depends on the purpose to which the  
9 model is being apply.

10 Q. Is a 30 percent differential from  
11 reality useful?

12 A. There's no abstract for that that is  
13 independent of the application of the model.

14 Q. So if the ARIMA model made a prediction  
15 that was a thousand percent off from reality, would  
16 that be useful?

17 A. It depends on the application. You said  
18 strictly we're talking about abstract terms. It  
19 depends on the application.

20 Q. If the ARIMA model showed a general  
21 increase, predicted a general increase, in the known  
22 true data or a general decrease, would the ARIMA



1 model be useful?

2 A. You said we're talking in abstract terms  
3 and that statement can't be evaluated without  
4 understanding what the purpose of the ARIMA model is.  
5 So there is no universal criterion corresponding to  
6 what you said.

7 Q. Is there any generally recognized test  
8 for whether a time-varying quantity exhibits inertia  
9 so that unexpected changes affect future values?

10 A. Inertia, what I'm calling inertia, is  
11 the degree to which the time series exhibits a moving  
12 average process, meaning that a shock to the process  
13 in one period either persists later or immediately  
14 peters out. That's the degree of inertia that I'm  
15 referring to, and the -- a time series that did not  
16 exhibit auto-regressivity or integration or a moving  
17 average process would generate results that are  
18 totally uninformative.

19 So the test for whether -- the test in this  
20 case that is useful for whether an ARIMA model is  
21 capturing important features of the data,  
22 auto-regressivity, integration, and a moving average

1 process is its ability to make out-of-sample  
2 predictions, which is why I conduct that test.

3 Q. Over how long of an interval do the  
4 future values have to be affected by an unexpected  
5 change?

6 A. Do they have to be? I don't understand  
7 what that means.

8 Q. One of your criteria for whether an  
9 ARIMA model is appropriate is that the time-varying  
10 data series exhibits inertia so that unexpected  
11 changes affect future values.

12 A. Um-hum.

13 Q. Okay. If you've got an over-damped time  
14 series, it's going to affect future values, but not  
15 for very long?

16 A. I don't know what the term "over-damped"  
17 means. I can't understand your question.

18 Q. You're not familiar with dampening in  
19 the context of time-varying data series?

20 A. "Dampening" is not a term that's used in  
21 economics. I'm not -- I have no idea what you mean  
22 by that.

1 Q. You're not familiar with the  
2 mathematical term "dampening" in the context of  
3 time-varying data series?

4 A. In many years of studying mathematics,  
5 including through graduate school, I never heard the  
6 word "dampening" used in a classroom teaching  
7 mathematics.

8 Q. Did you take differential equations,  
9 sir?

10 A. Yes.

11 Q. Prior to your analysis?

12 A. Many years ago. Yes, I did.

13 Q. And you never heard the term  
14 "dampening"?

15 A. I cannot recall a math professor ever  
16 talking about dampening.

17 Q. A tendency to return to the mean --

18 A. "In reversion" is the term that's used  
19 in econometrics for that. "Dampening" is not a term  
20 that I've heard used by any economist.

21 Q. Dampening is a measure of the degree you  
22 inject and input to vary a time data series. Does it

1 instantly return? Do you get one overshoot in return  
2 or do you get a gradual petering out?

3 MS. FUDIM: Objection to form.

4 THE WITNESS: I don't know what "you get a  
5 gradual petering out" means. You're talking about --  
6 I honestly don't understand your question.

7 BY MR. ST. JOHN:

8 Q. Your third criteria for whether an ARIMA  
9 model is appropriate is that the time-varying  
10 quantity drifts systematically upward or downward  
11 over time rather than always reverting to the same  
12 level; is that correct?

13 A. That would suggest that the time series  
14 exhibits a property called integration. Yes.

15 Q. Is there a generally accepted test for  
16 whether the time-varying quantity at issue drifts  
17 systematically upward or downward over time rather  
18 than reverting to the same level?

19 A. Yes. It's called a unit root test;  
20 however, the border encounters in -- I believe it's  
21 Figure 1 obviously have a general tendency to rise  
22 over the period 2011 to 2023. So that's why my model

1 allows for first-degree integration.

2 Q. Why that interval?

3 A. I referred to the entire dataset and  
4 that is the time, the interval of time, on which I  
5 fit the model.

6 Q. And isn't it just as easy to look at  
7 this dataset and say, Well, it seems to be returning?

8 You have waves of increasing magnitude and  
9 they seem to return to a median of around 30 or 40  
10 thousand encounters per month.

11 A. I'm looking at Figure 1 now and that is  
12 certainly not an accurate description of that graph.

13 Q. Sometimes it's above it. Sometimes it's  
14 below it.

15 When I look at Figure 1, I see a wave form  
16 that's -- with increasing magnitude -- I'll give you  
17 that -- above and below somewhere around 30 or 40  
18 thousand encounters a month.

19 So we disagree about that. What's the test?  
20 Is there a generally-accepted test to figure out  
21 whether an ARIMA model is appropriate?

22 Because that data series drifts sufficiently

1 systematically upward or downward over time rather  
2 than reverting.

3 MS. FUDIM: Objection to that portion before  
4 "is there a generally-accepted test?".

5 THE WITNESS: I referred to three ways that  
6 are common. The most widely accepted would be to see  
7 overall if -- to test overall whether the ARIMA model  
8 makes out-of-sample predictions that correspond to  
9 reality. A second is to look at the time series that  
10 clearly and unmistakably exhibits a long-term overall  
11 trend. There's no doubt in my mind, looking at the  
12 graph right now, and the third is what I referred to,  
13 the unit root test.

14 Q. You're looking at the graph. I disagree  
15 with you.

16 So my question is is there an objective test  
17 that's generally accepted, some version of math where  
18 we can plug these numbers in and it will give a  
19 thumbs up or thumbs down whether the data series  
20 drifts systematically upward or downward rather than  
21 reverting to the same level?

22 MS. FUDIM: Objection to everything before

1 "So before my question to you is".

2 THE WITNESS: There are three reasonable ways  
3 to do it. The most common in my discipline is to  
4 assess overall if the ARIMA model predictions -- if  
5 out-of-sample predictions made by the ARIMA  
6 correspond to reality. If you run an ARIMA model on  
7 a series that is not integrated and assume  
8 first-degree integration, the out-of-sample  
9 predictions will not be as good and vice versa.

10 A second way is to look at the data series  
11 which clearly and unmistakably, using my training in  
12 econometrics at Harvard University and my 21 years of  
13 experience analyzing large datasets, including time  
14 series data, show me without any doubt whatsoever  
15 that there is a clear long-term upward trend in  
16 border encounters and it would be inappropriate to  
17 simply assume no integration of this time series, and  
18 third is the unit root test.

19 BY MR. ST. JOHN:

20 Q. If you do a linear regression, there are  
21 measure of goodness of fit. Right?

22 A. ARIMA is not a linear regression.

1 Q. No. Sir, I'm not asking about an ARIMA  
2 model. I'm probing your knowledge. You're holding  
3 yourself out as an expert.

4 I'm probing your knowledge, and when you do a  
5 linear regression, there are tests of goodness of fit  
6 to the data. Correct?

7 A. There are tests of goodness of fit to in  
8 sample data, yes.

9 Q. Is there any equivalent test of goodness  
10 of fit for an ARIMA model, data in an ARIMA model?

11 A. The usefulness of the model in this case  
12 and the informativeness of the model for the tests  
13 that I run corresponds to its out-of-sample  
14 predictions, not its in sample fit. So that would  
15 not be an important statistic to report.

16 Q. The question is can you. Is there a  
17 test? Is there a test for goodness of fit other than  
18 it fits some limited set of out-of-sample data?

19 A. Can I report a statistic for goodness of  
20 fit that would not be informative to the tests that I  
21 ran? I can and I could have, but I didn't, because  
22 they would not be useful to the tests that I ran.



1 Q. Why would it not be useful to the tests  
2 that I ran?

3 A. Because I was assessing whether the  
4 evolution of border encounters over time following  
5 the advent of the policy that is out of sample with  
6 respect to the data used, which were up to and  
7 including May 2022 only exhibited evidence of a  
8 positive effect of the policy on border encounters,  
9 and I failed to find that.

10 Q. How close was the prediction from your  
11 ARIMA model to actual data?

12 A. So I conducted an out-of-sample test,  
13 and let me look up the exact numbers here.

14 So if you apply, if you arbitrarily choose, a  
15 cutoff date of a year before the policy after which  
16 true border encounters are known and then you use the  
17 same model to predict how border encounters would  
18 have evolved subsequently, between June of 2021 and  
19 March of 2023 when actual encounters were 200,295 per  
20 month, the model predicts 203,136 per month, a  
21 difference of only 1.4 percent, that suggests that  
22 the ARIMA model is capturing a great deal of

1 information about patterns in this time series.

2 Q. I read that. Let's look back at Figure  
3 2.

4 Right after your cutoff date of training data,  
5 the model predicts a decrease and the actual was an  
6 increase, and you didn't produce the table data. I  
7 would ask that that be produced.

8 I'm looking here and I see that's -- it looks  
9 like the model is predicting somewhere around 170,000  
10 and the actual is 210, 220 thousand; is that correct?

11 A. I don't have those figures in front of  
12 me.

13 Q. It's your graph, sir. I'm having to  
14 eyeball off the graph. So -- and it's your work.

15 So we'll start with a basic question. The  
16 model predicted a decrease and the actual was an  
17 increase. Is that correct, sir?

18 MS. FUDIM: Objection, vague.

19 You can answer.

20 THE WITNESS: A decrease from when to when  
21 and an increase from when to when?

22 BY MR. ST. JOHN:

1 Q. Looking at Figure 2, you've got a  
2 vertical red line demarcating training data and test  
3 data. Correct?

4 A. Yes.

5 Q. And immediately to the right of that  
6 vertical red line, your model predicts a decrease in  
7 encounters per month. The actual was an increase.  
8 Is that correct?

9 A. That is correct over a one-month period,  
10 which is why I test for effects over a much longer  
11 period and run concomitant tests that do not rely on  
12 ARIMA model predictions.

13 Q. And moving further right from the  
14 vertical red line in Figure 2, the model was, it  
15 looks like, getting close to 300,000 and then actual  
16 data dropped well down into the 200,000s, below  
17 200,000s, before coming back up with a delta of, I  
18 mean, it looks to be around a hundred thousand per  
19 month.

20 Is that correct?

21 A. It is correct that 22 months out from  
22 the cutoff date, that prediction is made. Yes.

1 Q. And the prediction is off by somewhere  
2 in the neighborhood of a hundred thousand encounters  
3 per month. Correct?

4 A. Although that is correct, it is not  
5 informative for the test that I run, which is over a  
6 10-month time horizon, not a 22-month time horizon.

7 Q. Why did you pick 10 months, sir?

8 A. I used all the data available at the  
9 time, which were up to and including March 2023. No  
10 other data were available.

11 Q. I mean, you got -- this is the data you  
12 used. This is the data in your report, and I'm  
13 seeing a difference of a hundred thousand encounters  
14 per month between model and actual.

15 We agree on that right?

16 A. No, we don't agree on that.

17 Q. What is it? What is it? What's the  
18 difference? What's the delta between model and  
19 actual at the end of your test data in 2023, looking  
20 at Figure 2?

21 A. Figure 2 is not an evaluation of the  
22 Asylum IFR of 2022, and the difference that you're

1 referring to occurs 22 months out from the policy,  
2 from the cutoff date in this exercise. The valuation  
3 that it did was over a 10-month period.

4 So the difference between the model and  
5 actuality at 22 months is irrelevant to the test that  
6 I conduct on the actual data.

7 Q. Why is it irrelevant?

8 A. Because the time horizon that I'm  
9 studying extends 10 months.

10 Q. And doesn't it suggest your model is  
11 less than accurate if it can't make the predictions?

12 A. No. It certainly does not.

13 Q. Why did you pick 10 months, sir?

14 A. As I told you, that was all the data  
15 available at the time I did the analysis.

16 Q. Then why is more data here in Figure 2?  
17 You had the data.

18 Is there a -- does Figure 2 show more data  
19 than what's in your analysis?

20 A. Figure 2 stops in March 2023, as I said.

21 Q. So within this data series, which this  
22 is part of your report, sir, the data you were

1 presenting shows a difference of somewhere in the  
2 order of a hundred thousand encounters per month  
3 between your model and the actual.

4 Can we -- we can discuss the relevance, but do  
5 you agree with that basic statement, that at the end  
6 of your data series in 2023, the difference between  
7 the model and the actual is somewhere around a  
8 hundred thousand encounters per month?

9 A. The ability of a model to make  
10 predictions at a 22-month time horizon is not  
11 informative in any way about its ability to make  
12 predictions over a 10-month time horizon. You're  
13 looking only at the final month. You're not  
14 describing any information about the first 10 months,  
15 which is the only information that would be -- that  
16 -- I shouldn't say only -- which would be the most  
17 informative portion of this comparison for the test  
18 that I run.

19 Q. Why is it the most informative?  
20 Why is 10 months the most informative?

21 A. I only had 10 months of post-policy data  
22 available to me in doing this analysis. So the

1 ability of the model to make predictions at a much  
2 longer time horizon is not informative about the  
3 usefulness for that analysis.

4 Q. If the data -- I know there's a gap  
5 here. Why was the data not available to you to make  
6 the analysis? Because I see it in Figure 2.

7 A. Figure 2 is not an evaluation of the  
8 effect of the Asylum Processing IFR of 2022, as the  
9 report clearly states.

10 Q. So your only reason for not including  
11 this subsequent data or this 2022 data is that you  
12 didn't have it at the time you ran the analysis?

13 A. Not including it? It didn't exist. So  
14 there was nothing that existed to omit.

15 Q. Sir, I'm looking at Figure 2. Did you  
16 consider all of the data reflected in Figure 2?

17 A. In making Figure 2, did I consider all  
18 of this data in Figure 2? Yes.

19 Q. In your analysis, did you consider all  
20 of the data reflected in Figure 2?

21 A. In my analysis, I considered the CPB  
22 data on southwest border apprehensions of

1 inadmissible migrants from October 2011 through and  
2 including March 2023, which were the entirety of the  
3 data available when I did the analysis.

4 Q. Okay. So let's focus in on March 2023.  
5 That's the far right end of the data series in  
6 Figure 2. Correct?

7 March 2023?

8 A. In this validation exercise for the  
9 model which is not an evaluation of the effect of the  
10 Asylum Processing IFR of 2022, that is the last data  
11 point on the right side of the graph, yes.

12 Q. On the far right side of the graph, your  
13 validation, there is a difference of somewhere around  
14 a hundred thousand encounters per month between what  
15 your model predicts and the actual data; is that  
16 correct?

17 A. At a time horizon that is not  
18 informative about the predictive capacity of the  
19 model on a 10-month time horizon, and in one month in  
20 isolation, that is a current statement.

21 Q. Looking at the data points, it actually  
22 looks like two or three months in the series;



1 wouldn't you agree with that?

2 A. You had asked me about a specific  
3 statement that you made and I said that that  
4 statement was correct. Now you're asking me about a  
5 different period.

6 Q. So, sir, at the far right end, your  
7 model is off by roughly 30 percent. The model is  
8 predicting somewhere just under 300,000 encounters  
9 per month and the actual is somewhere just under  
10 200,000 thousand.

11 So, actually, that's -- you could consider it  
12 being 50 percent over. Your model was 50 percent in  
13 excess. Correct?

14 A. The fit of this ARIMA model and any  
15 ARIMA model would be expected to be lower the further  
16 you get from the cutoff before which information is  
17 incorporated into the model, and during that time  
18 period which is well beyond the horizon the data  
19 analysis that I'm doing, there is a divergence, yes.

20 Q. Well, you do fit over a longer period to  
21 check the model. Right?

22 That's the whole idea, is to -- is the model

1 actually predictive.

2 A. I don't know what you mean by "the whole  
3 idea". What is important is that the model is  
4 informative on the 10-month time horizon, because  
5 that is the horizon over which I assess whether there  
6 is evidence of a positive effect of this policy in  
7 the analysis, which is not this figure, because this  
8 figure is not an evaluation of the effect of the  
9 policy.

10 Q. It's an evaluation of the model.  
11 Correct?

12 A. It is a check to see if the ARIMA model  
13 is informative about the data series, and it is very  
14 strong evidence that the ARIMA model is informative  
15 about this data series.

16 Q. Is there any objective test for whether  
17 it's informative other than your experience?

18 MS. FUDIM: Objection.

19 THE WITNESS: It depends, informative  
20 depends, upon the purpose, and for the purpose that I  
21 use it, it is highly informative.

22 BY MR. ST. JOHN:

1 Q. Why? Why do you conclude it's highly  
2 informative?

3 A. I conclude it's highly informative  
4 because -- because from my decades of experience  
5 doing an applied econometrics model that is capable  
6 of making an out-of-sample prediction of a highly  
7 varying time series over a substantial period like  
8 this that matches to a degree of 1.4 percent is an  
9 extraordinarily informative and predictive model.

10 Q. It's interesting -- so there are  
11 several-month periods to the right of the red line in  
12 Figure 2 where your model is out of phase with the  
13 actual. Do you understand what I mean "out of  
14 phase"?

15 A. There is -- if you mean there's not a  
16 perfect fit, there is certainly not a perfect fit.  
17 My goal in this exercise was not to make a perfect  
18 prediction and the ARIMA model is not generally  
19 capable of making a perfect prediction.

20 Q. Beyond not perfect, I see at least two  
21 places where actual goes up substantially and the  
22 model goes down. Would you agree with that?

1           A.       That would be true of any ARIMA output  
2     relative to the truth, that it is not a perfect fit  
3     and ARIMA models are not designed to and do not  
4     create perfect predictions of the future.

5           Q.       You talk about a difference of only 1.4  
6     percent, but that comes by something you would  
7     probably call integrating two curves that are out of  
8     phase.

9           So I'll mark this Exhibit 5.

10          COURT REPORTER:   Six.

11                               [Exhibit No. 6 was marked  
12                               for identification.]

13          MR. ST. JOHN:   Six.   Thank you, Madam Court  
14     Reporter.

15     BY MR. ST. JOHN:

16          Q.       Exhibit 6 is a document I've drawn.  
17     There's a blue curve and a black curve.

18          You would agree with me that those two curves  
19     are 180 degrees out of phase.   Correct?

20                   [Witness peruses exhibit.]

21     BY MR. ST. JOHN:

22          Q.       Sir, if you don't have an understanding

1 of Calculus 1, like please speak up and we can deal  
2 with that, but --

3 MS. FUDIM: Objection.

4 BY MR. ST. JOHN:

5 Q. I see two waves 180 degrees out of  
6 phase; would you agree with that?

7 [Witness further peruses exhibit.]

8 BY MR. ST. JOHN:

9 Q. Meaning that the top of one coincides  
10 with the bottom of the other or the peak, I guess to  
11 be more accurate, coincides with the trough of the  
12 other curve.

13 A. I'm pausing because I'm struggling to  
14 grasp the connection of the sign waves that you  
15 repeatedly mentioned to my analysis, which has  
16 nothing to do with mathematics of sign waves, but  
17 yes. I see a graph with curves that are out of  
18 phase.

19 Q. 180 degrees out of phase. Right?

20 A. If you had drawn it properly.

21 Q. Forgive the freehand.

22 If one of those were your model -- let's

1 assume one of those is your model, not of immigration  
2 data. One is your model. The blue curve is your  
3 model. The black curve is the actual data.

4 If you sum those two curves to test the model  
5 over the time period one to two, it's going to  
6 exactly match, isn't it?

7 It's going to have a hundred percent  
8 correctness of fit.

9 A. This is a totally hypothetical question.  
10 I don't use Fourier decomposition in my analysis.  
11 Fourier decomposition in economic analysis would not  
12 be an appropriate tool to apply in this case and I  
13 can't sit here and come up with conjectured opinions  
14 about tools that would be inappropriate in my  
15 discipline and which I did not apply to this data.

16 Q. Here's the problem: It strikes me as  
17 that's exactly what you did. You summed up the total  
18 number of encounters that your model predicted over a  
19 time period and you summed up the total number of  
20 actual encounters. So you integrated both curves,  
21 correct, and then compared the difference?

22 A. I said I didn't do a Fourier analysis.

1 You said that's exactly what you did. That's not a  
2 true statement.

3 I didn't incorporate any Fourier decomposition  
4 into this analysis. It would inappropriate to do so  
5 based on my training and experience, and I do not  
6 incorporate sign waves or Fourier decomposition in  
7 this analysis in any way, shape, or form.

8 Q. Sir, so tell me how you got to the 1.4  
9 percent.

10 So in your words, in the 22 months from June  
11 '21 through March 2023, actual encounters were  
12 200,295 per month on average while the model predicts  
13 203,136, and you got that by comparing the average  
14 value of the two curves over 22 months. Correct?

15 A. This is a very simple test for the  
16 out-of-sample prediction ability of the model. I  
17 asked whether the -- if the policy cutoff date had  
18 been a year earlier, would the model have been  
19 informative about how the illegal migration would  
20 have evolved in the absence of the policy over that  
21 time, and the simplest, most intuitive test of that  
22 question is to ask how many subsequent border

1 encounters were observed compared to how many would  
2 have been predicted by the model.

3 It's not a complex mathematical exercise.  
4 It's a very simple intuitive question.

5 Q. Well, if it's a very simple intuitive  
6 thing, how are you getting 1.4 percent?

7 Why don't you walk us all through that, sir.

8 A. The 1.4 percent is the difference  
9 between total encounters predicted after the  
10 artificial 2021 cutoff date and actual encounters  
11 after that date or, as it's reported in the text,  
12 that same number divided by 12. Both of them would  
13 differ by 1.4 percent.

14 Q. So you're saying -- or you only tested  
15 your model for its ability to predict an average over  
16 22 months, not its ability to predict over a shorter  
17 time period. Correct?

18 A. I didn't report all possible tests of  
19 that. I plotted in full all of the predictions and  
20 all of the actual realized value of the time series  
21 in Figure 2 so that anybody could assess at any time  
22 horizon they're interested in whether the model was



1 capturing information about that time series, and it  
2 clearly captures a great deal of information about  
3 that time series.

4 Q. It doesn't say three- to six-month time  
5 horizons. It doesn't even capture direction.  
6 Correct?

7 Not accurately?

8 There are two extended periods where your  
9 model is trending down and actuals are trending up or  
10 vice versa.

11 A. The ARIMA model does not seek to and  
12 does not make a perfect prediction of the time  
13 series. So even in a very close match, there are  
14 going to be times where one is up and the other one  
15 is down as they move with respect to each other.

16 So that is perfectly consistent with an  
17 excellent fit.

18 Q. A 50 percent difference is an excellent  
19 fit?

20 A. There is not a 50 percent difference  
21 there. As I said, the --

22 Q. In some months, there are. Correct?

1           A.       The ability of any of the three methods  
2   that I apply to make a perfect prediction of the  
3   counterfactual in any single month does not determine  
4   the informativeness of three tests concurrently and  
5   would not change my opinion.

6           Q.       The fact that your test is wrong by 50  
7   percent in a given month doesn't change your opinion?

8           A.       That's a false statement of the  
9   reliability of the model.

10          Q.       Sir, I'm going to ask on the record. I  
11   want the raw data produced, because it's a nice  
12   logarithm table or logarithmic presentation of the  
13   data.

14          MS. FUDIM: If you have a request for data or  
15   additional documents, please put that request in  
16   writing to counsel and we'll take it under advisement  
17   and respond to it in accordance with the federal  
18   rules.

19          MR. ST. JOHN: Okay. I want the underlying  
20   data, please, including from the model, please. I  
21   think that was part of your obligation, for the  
22   report to include the data, not just a graph of it.

1 MS. FUDIM: Again, please put the request in  
2 writing and we'll take it under advisement and  
3 respond to it pursuant to the federal rules.

4 BY MR. ST. JOHN:

5 Q. So, sir, is your testimony that when I  
6 get this data, I'm not going to see your numbers  
7 being off, your model being off by 50 percent in a  
8 given month?

9 A. When you say "a given month", I  
10 understood you mean any given month, which is why I  
11 said that statement was false. By "a given month",  
12 are there months in which there is a substantial  
13 difference?

14 As the figure transparently shows, there are  
15 some months where this is a substantial difference;  
16 however, the usefulness of the second test that I run  
17 does not depend on the degree of match in any single  
18 month.

19 Q. But there's no objective test for that.  
20 Right?

21 It's just your opinion?

22 A. There are objective criteria for

1 building the ARIMA model, and the second test that I  
2 run is asking something very -- is asking a very  
3 clear and transparent question, which is did actual  
4 border encounters after the advent of the Asylum  
5 Processing IFR of 2022 evolve in a way that was above  
6 the levels and trends that would have been predicted  
7 based on past persistence, time trends, inertia,  
8 seasonality, and relationship with U.S. labor market  
9 conditions, and the actual apprehensions are below  
10 that number.

11 That's not the only test that I run, but it's  
12 an informative one especially concurrently with the  
13 other tests.

14 Q. Sir, you used a logarithmic scale for  
15 the Y Axis. Correct?

16 A. I believe all the figures have a  
17 logarithmic scale, yeah.

18 Q. And there's pretty widespread concern in  
19 the -- pretty widespread concern, period, with the  
20 use of logarithmic scales as misleading. Correct?

21 MS. FUDIM: Objection.

22 BY MR. ST. JOHN:

1 Q. They can be very misleading?

2 A. Not in my discipline, certainly not in  
3 economics. It's the most common transformation to  
4 use in data of this kind.

5 Q. Well, when you're presenting to the  
6 public, there is a concern with logarithmic scales  
7 being misleading. Correct?

8 A. I'm offering my testimony as an expert  
9 economist, and in my discipline, this is very  
10 standard practice.

11 Q. Just as a general citizen, are you  
12 familiar with company called Purdue Pharma?

13 A. I have heard, I think, of Purdue Pharma.

14 Q. My recollection is that the Federal  
15 Government indicted the company and a whole pile of  
16 states sued them. They're bankrupt.

17 Is that consistent with your recollection just  
18 as a general citizen?

19 MS. FUDIM: Objection.

20 THE WITNESS: I don't know what you're  
21 talking about.

22 BY MR. ST. JOHN:

1 Q. So you don't know if part of the reason  
2 a whole pile of states and the Federal Government put  
3 Purdue Pharma out of business was for misleading the  
4 public with logarithmic scales on drug data?

5 MS. FUDIM: Objection.

6 THE WITNESS: It would be misleading not to  
7 use a logarithmic scale in the analysis that I do,  
8 which is why I do use a logarithmic scale, and I  
9 explain why in the report.

10 BY MR. ST. JOHN:

11 Q. How many of the aliens encountered at  
12 the border -- we can narrow it down to the southwest  
13 border -- during the time period you looked at were  
14 eligible for processing under the Asylum IFR?

15 A. I'm not a legal expert. I wouldn't know  
16 how to assess that quantity and it's not contained in  
17 the CPB statistics that I looked at.

18 Q. Do you know in the time period you  
19 looked at how many aliens were actually processed  
20 under the Asylum IFR?

21 A. The factual claims in the complaint I  
22 was asked to assess do not pertain to that quantity.

1 So I did not look at that quantity.

2 Q. Are you aware of anyone else who -- or  
3 anyone who has published a study that applied an  
4 ARIMA model to migration data?

5 A. ARIMA is a set of assumptions in  
6 application of time series econometrics and time  
7 series econometrics are very commonly applied to  
8 model migration behavior. I, myself, have done it  
9 and I'm confident that it has been applied.

10 I can't -- at the moment, I don't recall a  
11 specific paper that did.

12 MR. ST. JOHN: Why don't we take a  
13 five-minute break.

14 MS. FUDIM: All right.

15 VIDEOGRAPHER: Off the record. The time is  
16 2:17.

17 [Recess.]

18 VIDEOGRAPHER: On the record. The time is  
19 2:28.

20 BY MR. ST. JOHN:

21 Q. Welcome back, Mr. Clemens.

22 A. Thank you.

1 Q. You understand you're still under oath?

2 A. Yes.

3 Q. You testified that the required accuracy  
4 of the predictions depends on the specific use of the  
5 ARIMA model; is that correct?

6 A. The required accuracy of the  
7 predictions? I don't know what "required" means in  
8 that context.

9 Q. Well, my understanding of your testimony  
10 is that whether the predictive value of an ARIMA  
11 model is useful, how good the fit is, depends on the  
12 particular use of the ARIMA model.

13 A. Yes.

14 Q. As used here, is there any objective  
15 test for goodness of fit?

16 A. I need to explain what the second test  
17 that I run is. The second test that I run is not can  
18 I make a perfect prediction of what illegal migration  
19 would have been in the absence of the policy and  
20 compare illegal migration to it.

21 The test that I run is did illegal migration  
22 rise relative to the trend that would have been



1 predicted based on past trends in the data as  
2 reflected by persistence, time trends, inertia,  
3 seasonality, and overall U.S. labor market  
4 conditions. It is useful for that purpose  
5 independently of whether it make a flawless  
6 prediction.

7 So the degree of confidence in its  
8 flawlessness is not relevant to what I do. What I  
9 want to know is whether it contains a substantial  
10 amount of information about the time series, and my  
11 experience in econometrics lets me know that a model  
12 with this high a degree of predictiveness is clearly  
13 capturing a great deal of information about patterns  
14 in the time series.

15 Q. Is there an objective test for how  
16 significant the departure from the predictive value  
17 needs to be in order for you to conclude there was,  
18 in fact, a positive effect from the IFR?

19 A. I didn't detect any positive effect.

20 Q. Different question. The question is is  
21 there an objective test for how significant the  
22 departure from your prediction would have to be in

1 order for you to conclude there was a positive effect  
2 from the Asylum IFR?

3 A. You're asking me what would lead me to  
4 change my conclusion that there is no evidence of a  
5 positive effect?

6 Q. Correct.

7 A. If I saw in any of three tests that I  
8 ran a trend in illegal migration following the advent  
9 of the policy that was higher than counterfactual  
10 illegal migration as estimated in that method, that  
11 would have been evidence of a piece of evidence in  
12 support of the conjecture that there was a positive  
13 effect, but I didn't observe that in any of the three  
14 tests.

15 Q. How large would that trend have had to  
16 be?

17 A. I did not observe any positive --  
18 evidence of any positive effect of any magnitude in  
19 any of three tests that I ran, which is why I  
20 conclude that there isn't evidence of any positive of  
21 any magnitude.

22 Q. That's a different question. I

1 understand what you didn't observe.

2 The question is how large of a positive  
3 magnitude change would you have observe to conclude  
4 there was a positive effect from the Asylum IFR?

5 A. You're asking if I had observed  
6 something in the data that I did not observe,  
7 hypothetically, how would I have modified my  
8 conclusions?

9 Q. How large of an effect would it take for  
10 you to modify your conclusions?

11 A. If I had observed a positive effect in  
12 any of the three tests that I ran, I would need to  
13 carefully evaluate whether that positive effect was  
14 compatible or incompatible with the statements I was  
15 asked to evaluate, but it was made much easier by the  
16 fact that I did not observe any evidence of any  
17 positive effect.

18 Q. Is there any objective test for how  
19 large the effect would need to be for you to change  
20 your conclusions?

21 A. I was asked to evaluate qualitative  
22 statements about the effect of the Asylum Processing

1 IFR on a quantity, that is the factual claims I was  
2 asked to assess are not -- are claims about a  
3 movement in a quantity. If they increase, there are  
4 words that suggest that the -- there are words in the  
5 complaint that suggest that the meaning of those  
6 terms is not -- would need to be carefully assessed  
7 against any given positive effect, if I had detected  
8 a positive effect.

9 For example, the complaint refers to a, quote,  
10 explosion of monthly border encounters. It refers to  
11 -- it makes many references to a -- that suggest a  
12 large effect.

13 If I had detected a positive effect of any  
14 kind, hypothetically, I would need to compare the  
15 quantitative effect that I measured against those  
16 qualitative statements and assessed whether the  
17 quantity that I measured hypothetically corresponded  
18 to the qualitative statements in the complaint;  
19 however, I didn't have to do this exercise and did  
20 not do that exercise because I did not detect any  
21 positive effect of any kind in any of the three tests  
22 that I ran.

1 Q. So I've repeatedly asked you, and it's  
2 okay if your answer is there is none, what size of a  
3 positive effect would you have to see in order to  
4 conclude the Asylum IFR did have a positive effect on  
5 border encounters at the southwest border?

6 A. I didn't do that analysis and I'm not  
7 going to -- I can't offer expert testimony off the  
8 top of my head about an analysis that I didn't do. I  
9 didn't have to do the analysis, the analysis of  
10 comparing the hypothetical positive effect that I  
11 hypothetically observed in the data to the statements  
12 in the complaint, because I didn't detect any effect.

13 So you're asking me about a hypothetical thing  
14 that I might have done if the results had been  
15 different, and I can't make an assessment off the top  
16 of my head. I would need to see that result and  
17 assess it in light of the claims in the complaint.

18 Q. Did you validate your analysis by  
19 running the same analysis with other policies?

20 A. As I mentioned earlier, I initially  
21 considered doing that and then I realized that I did  
22 not have the legal expertise to argue for what an

1 economist would call the external validity of those  
2 tests, that is their relevance to the question I was  
3 asked to assess, which is the effect of the Asylum  
4 Processing IFR. So I decided that I would not form  
5 my opinion based on such analysis.

6 Q. So the answer is, no, you did not; is  
7 that correct?

8 A. I initially considered it and I looked  
9 at the data, for example, about MPP, as I indicate in  
10 the report, and I ended up forming the opinion that's  
11 in the report independently of those other policies.

12 Q. How far along did you get with the MPP  
13 analysis?

14 MS. FUDIM: Objection, vague, but you can  
15 answer.

16 THE WITNESS: I don't know what you mean by  
17 "how far along". I made -- I looked at the data. I  
18 made some graphs of the data. I -- to an economist  
19 who is not conducting analysis for a legal  
20 proceeding, looking at other related policies would  
21 be a common thing to do. So I was acting on  
22 instincts as an economist who has not participated in

1 legal proceedings in this way.

2 In the -- I realized when trying to describe  
3 those figures in a way that I found compelling, that  
4 in order to argue that evidence from other policies  
5 was pertinent to the factual question I was tasked  
6 with examining, I would need to make a clear argument  
7 for their external validity, and as I tried to  
8 formulate an argument for their external validity, I  
9 found myself reading and failing to understand legal  
10 documents that I would need to make a compelling  
11 argument about external validity, and I ended up  
12 realizing that I did not have the expertise to make a  
13 clear argument for external validity and I decided  
14 not to use that evidence in forming my opinion.

15 BY MR. ST. JOHN:

16 Q. What did your analysis show with MPP?  
17 Did it show an effect on border encounters by MPP?

18 A. This was in April and I haven't looked  
19 at it since and I don't remember the details.

20 Q. You said you got your results and then  
21 you were trying to -- strike that.

22 Why did you feel you had the legal knowledge

1 to look at the asylum rule, but not MPP?

2 A. I don't have legal knowledge of any  
3 kind. I needed to know very basic facts about the  
4 Asylum Processing IFR to assess it using the method I  
5 used. You don't have to argue for external validity  
6 of tests of a policy when that policy is the policy  
7 whose effect is being evaluated. You do need to  
8 argue for external validity of tests of other  
9 policies, and I realized that I lacked the legal  
10 knowledge to argue for the external validity of  
11 policies that are not the policies that is described  
12 in the statements of fact I was asked to assess.

13 Q. Isn't that backwards? The way you  
14 validate a test is by running the test on something  
15 with a known result.

16 Okay. I think this test is showing me that  
17 "X" causes "Y". Let's look at another "X" and make  
18 sure it causes the same "Y".

19 That's external validity. Right?

20 A. I didn't understand what you just said.

21 Q. How do you define external validity?

22 A. External validity is the -- well,



1 different economists define it differently, but a  
2 common definition of external validity is the  
3 informativeness of a test of a policy intervention on  
4 a certain population to a test of a different policy  
5 and/or on a different population and/or at a  
6 different time.

7 Q. Did you perform any test of external  
8 validity on the tests you performed on the IFR?

9 A. In the three tests that I run on the  
10 Asylum Processing IFR, that is the policy of  
11 interest. So there is no question about its external  
12 validity.

13 Q. Well, there's a question about the  
14 external validity of the tests themselves. Right?

15 A. No. No. There's no -- in the tests that  
16 I run, there is no shortcoming of external validity.

17 Q. Why couldn't you run the same test on  
18 MPP?

19 A. The factual claims in the complaint I  
20 was asked to assess are not related to MPP. They're  
21 related to the Asylum Processing IFR of 2002.

22 Q. Well, no. The claim is does it increase

1 migrant flow. Okay?

2 Did MPP increase or decrease migrant flow?

3 It's pretty straightforward, isn't it?

4 A. The factual claims I was asked to assess  
5 were about the Asylum Processing IFR of 2022.

6 Q. But you started to assess MPP?

7 A. It would be a normal thing in economic  
8 analysis to draw on evidence from other policies  
9 provided that one could clearly understand the  
10 external validity of those other policy changes to  
11 the policy change at issue, and I initially thought I  
12 would be able to develop a sufficient knowledge to  
13 make a clear argument for that external validity and  
14 came to understand that I didn't have that knowledge.  
15 So I did not form my opinion on those other tests.

16 Q. What knowledge were you missing  
17 regarding MPP?

18 A. MPP and the Asylum Processing IFR are  
19 very complex policy changes and arguing that one is  
20 analogous to the other would require a deep  
21 understanding of their functionality and effect of  
22 migrant incentives that I determined that I could not

1 achieve given my knowledge and expertise.

2 Q. Why would you need a deep understanding?

3 I mean, I haven't seen any deep understanding  
4 here. I've seen a data series that you apply a test  
5 to and you say, Well, the result of the test doesn't  
6 deviate too much from, in my opinion -- your opinion,  
7 actually -- the true data, good to go, no effect.

8 A. That's false. I conducted three  
9 different tests and you described one of them in a  
10 way that does not describe how I reached my  
11 conclusion.

12 Q. So what is the deep understanding you  
13 have, sir, about the Asylum IFR?

14 A. I don't have legal expertise. I don't  
15 claim or have a deep understanding of the Asylum  
16 Processing IFR. That is not necessary to conduct the  
17 tests that I ran, because as I mentioned, there is no  
18 concern about external validity of a test when that  
19 test is testing the actual policy of interest, which  
20 is what I do.

21 That concern would only arise when applying  
22 the conclusions of evaluations of other policies in

1 other settings at other times to a different policy  
2 in a different setting at a different time.

3 Q. What are your concerns with external  
4 validity applying the same tests to MPP?

5 A. Because MPP is not the Asylum Processing  
6 IFR of 2022 and I was asked to assess factual claims  
7 about that policy.

8 Q. That's a tautology, sir. It's not the  
9 same. They agree.

10 MS. FUDIM: Is there a question?

11 BY MR. ST. JOHN:

12 Q. What about MPP would prevent you from  
13 running the exact same tests and performing the  
14 exactly same analysis as you did with the Asylum IFR?

15 A. The thing that would prevent me from  
16 doing that analysis is that I was asked to assess  
17 factual claims about the Asylum Processing IFR of  
18 2022 and not about every other migration policy ever  
19 enacted at the southwest border.

20 Q. But, sir, you at some point in preparing  
21 this report thought it was a good idea to assess MPP.

22 A. As I said, yeah.

1 Q. And that wasn't exactly what you were  
2 asked to do, but, presumably, you did that. You  
3 spent the United States' money doing that analysis or  
4 starting that analysis because you thought it was  
5 relevant to what you were asked to do.

6 You would not have filed a false claim with  
7 the United States for doing some work that you  
8 weren't asked to do that was completely irrelevant.  
9 Right?

10 MS. FUDIM: Objection.

11 BY MR. ST. JOHN:

12 Q. That's a simple question. You would  
13 have filed a claim -- you would have not submitted a  
14 bill to the United States for doing completely  
15 irrelevant work. Right?

16 A. [Pause.]

17 Q. That's a yes or no question.

18 MS. FUDIM: Objection.

19 THE WITNESS: No, sir. I did not file any  
20 false claims.

21 BY MR. ST. JOHN:

22 Q. Because there's a very strong incentive

1 against filing false claims. Right?

2 MS. FUDIM: Objection.

3 THE WITNESS: I don't file false claims  
4 because it's wrong.

5 BY MR. ST. JOHN:

6 Q. And you go to jail for a long time.  
7 Right?

8 MS. FUDIM: Objection.

9 THE WITNESS: I don't do that. So I don't  
10 have any idea what the legal consequences would be.  
11 It would be unethical and I would never do it.

12 BY MR. ST. JOHN:

13 Q. So you, presumably, thought the MPP  
14 analysis was relevant; you did bill the United States  
15 for that. Right?

16 A. I thought that it was possible for me to  
17 attain the degree of knowledge of the structure and  
18 implementation of MPP that would allow me to  
19 forcefully argue for its external validity to  
20 assessing the effects of Asylum Processing IFR. As I  
21 did the research, I realized that I could not, given  
22 my background and expertise, achieve a degree of

1 legal expertise that would be required to make a  
2 forceful argument for external validity, and for that  
3 reason, I corrected my analysis.

4 Q. At any point, did you even preliminarily  
5 conclude that MPP had an effect on southwest border  
6 encounters?

7 A. I don't remember seeing that in the  
8 data, but I haven't looked at it in several months  
9 and I don't remember.

10 Q. Did your data, even on a preliminary  
11 basis, fail to establish a positive effect by MPP on  
12 southwest border encounters?

13 A. I don't remember any evidence in the  
14 preliminary analysis that I did of any effect one way  
15 or the other, but I'm not sure because it's not  
16 relevant to my conclusions and I haven't looked at it  
17 in six or seven months.

18 Q. In your ARIMA analysis, is there any  
19 objective test for the appropriateness of the time  
20 period comparing your model to actual data other than  
21 that's the data that was available to you?

22 MS. FUDIM: Objection to form.

1 BY MR. ST. JOHN:

2 Q. I think just -- I'll try to make it  
3 easier.

4 I think, earlier, you testified you had 10  
5 months of data available; so that's what you used.  
6 Is that a fair summary of what you testified to?

7 A. That was the available data and that is  
8 an appropriate time horizon on which to evaluate this  
9 policy's effect.

10 Q. Is there an objective test of what  
11 constitutes an appropriate time horizon?

12 A. My expertise suggests that 10 months is  
13 an appropriate time horizon over which to evaluate  
14 these effects. So I determined that 10 months of  
15 available data, which was all the data available at  
16 the time, was sufficient to conduct meaningful tests.

17 Q. So there's no objective test; it's just  
18 your expertise; is that correct?

19 A. I -- is there an objective test in the  
20 abstract over what time horizon?

21 Over the time horizon over which any given  
22 ARIMA model's out-of-sample predictions should be



1 assessed.

2 Q. Correct.

3 A. It would be meaningless to assess them  
4 in the abstract. The usefulness and informativeness  
5 depends on the time horizon of interest to a specific  
6 application of the model.

7 Q. So what goes into that analysis of the  
8 specific application?

9 What did you consider -- other than your  
10 expertise, what did you consider in concluding 10  
11 months was adequate?

12 A. My charge in this case was not to rule  
13 out every possible hypothetical effect of this  
14 policy, nor was it to demonstrate that the effect of  
15 the policy was zero. My charge in this case was to  
16 assess whether there was evidence in the data, all of  
17 the data available at the time, of an effect of the  
18 policy, of a positive effect of the policy on illegal  
19 migration; and for several reasons, I concluded that  
20 10 month was more than sufficient to assess those  
21 statements.

22 Q. Name each of the reasons.

1           A.       So my reasons included, but are not  
2 necessarily limited to, the fact that when policy  
3 changes at the border have substantially affected  
4 migrants' incentives, they can react very quickly to  
5 those changes. I'm thinking, for example, of the  
6 changes in October of 2022 with respect to Venezuelan  
7 migrants which affected their eligibility for asylum  
8 when arriving at the border, changes for Cuban  
9 migrants in January of 2023 and changes for  
10 Nicaraguan migrants in January of 2023. DHS publicly  
11 reported that there was, roughly, a 90 percent or  
12 greater drop in encounters with migrants of those  
13 nationalities after policy affected their migration  
14 incentives with respect to asylum eligibility.

15               So it was a very rapid effect. It did not  
16 take even one month in any of those cases, much less  
17 two, three, four, six, eight, or ten months to be  
18 realized. That's one important reason.

19               A second is that the policy was announced --  
20 well, the date of enactment of the policy was  
21 publicly announced two months in advance. So that  
22 would be more than enough time for migrants, if they

1 were going to react to policy, to approach the border  
2 in advance of the actual enactment date.

3 There was even in the initial Notice of  
4 Proposed Rulemaking, which I understand was several  
5 months before, there was a statement of some sort of  
6 intent to change the policy. I don't believe there  
7 was a specific date there, but the date of enactment  
8 was publicly announced two months in advance.

9 A second or -- excuse me -- a third reason is  
10 that I'm aware that DHS has published cohort reports  
11 on the number of migrants processed, whose asylum  
12 claims have been processed by asylum officers and  
13 adjudicated by asylum officers, and in looking at  
14 those data, which I don't have in front of me, there  
15 was a -- in the first month of enactment of the  
16 policy, June of 2022, there were a substantial number  
17 of people processed, and in the entire June-to-June  
18 period that is reported in those statistics, I did  
19 not observe an upward trend in that number.

20 In other words, it doesn't seem to be the case  
21 in DHS's opinion that enactment of the policy, for  
22 example, was just beginning to ramp up at the end of

1 the 10-month period that I looked at. It seems to  
2 have been roughly constant over the 10-month period  
3 that I looked at.

4 So all of those things are suggesting that it  
5 would be -- it would be strange to expect a long-term  
6 effect outside the 10-month window in the absence of  
7 any effect within the 10-month window.

8 A fourth reason is the complaint, the factual  
9 claims in the complaint itself. They don't refer to  
10 long-term effects in any language that I'm aware of  
11 in the complaint. They refer to the potential for a,  
12 quote, explosion in monthly encounters at the border.  
13 That doesn't seem to be language that's compatible  
14 with a claim that the effect would be zero for years  
15 and then suddenly explode.

16 That didn't seem to me to be an interpretation  
17 of the factual claims in the report that was -- that  
18 would be reasonable.

19 So those are four reasons, and there may have  
20 been others, but those are the ones that come to mind  
21 now.

22 Q. Okay. So looking at those reasons, so

1 the first is that migrants can react very quickly.  
2 They hear about a policy. They know about the policy  
3 and are very quickly going the react; is that it?

4 A. It means that I don't have a reason to  
5 think that, in general, it must take months for  
6 migrants to learn that a policy changed and react to  
7 it in their behavior. Those are clear examples where  
8 that happened on the time scale of weeks.

9 Q. And if that wasn't the case, that might  
10 impact the time period that you analyzed; is that  
11 correct?

12 A. I listed several reasons. So if any one  
13 of them were not the case, then I would need to  
14 re-evaluate that. I would need to consider the new  
15 totality of the evidence.

16 Q. It would impact -- if any of those  
17 things weren't true, it would raise a question that  
18 you would need to reanalyze; is that fair?

19 A. It would depend on what was not true and  
20 the degree to which it was inaccurate.

21 MR. ST. JOHN: No further questions.

22 MS. FUDIM: Okay. I have a couple. Can we

1 take a one-minute break?

2 MR. ST. JOHN: Sure.

3 MS. FUDIM: Thank you.

4 VIDEOGRAPHER: Off the record. The time is  
5 2:59.

6 [Discussion held off the record.]

7 VIDEOGRAPHER: On the record. The time is  
8 3:00.

9 MR. ST. JOHN: While we were off the record,  
10 counsel for the United States intended she indicated  
11 -- indicated she intended to confer with the witness  
12 before asking him questions. The Plaintiff States  
13 objected, stating the witness was on the stand and  
14 there are no non-privileged conversations with the  
15 witness other than whether or not to assert a  
16 privilege.

17 MS. FUDIM: And as counsel for the United  
18 States, I disagree with that. If a question is  
19 pending by Plaintiffs' counsel, it would be  
20 appropriate to speak with the witness; however,  
21 you've concluded your questions and I wish to clarify  
22 with the witness whether or not I understood

1 something he said, and I submit that I'm entitled to  
2 do that.

3 If you disagree, you can obviously then take  
4 that to the judge, and if the judge agrees with you,  
5 then you may have the right to ask what that question  
6 was and what the answer was; but I disagree with the  
7 statement you're making. The witness has answered  
8 all your questions. There have been no breaks  
9 between questions, but I submit that I have the right  
10 to ask him if I understood something he said  
11 correctly so that if it's vague, I can ask the  
12 witness to clarify.

13 MR. ST. JOHN: We're on the record. You're  
14 welcome to ask the witness if you understood  
15 something.

16 MS. FUDIM: I'm not going to do it that way.  
17 I'm going to ask him outside the room, but, of  
18 course, if you take issue with that, you can raise it  
19 with the Court, and if the Court agrees with you,  
20 then the Court will agree with you and you'll have  
21 the opportunity to ask what that question was and  
22 what the answer was.

1 MR. ST. JOHN: Ms. Fudim, do not coach the  
2 witness.

3 MS. FUDIM: I take offense that you think  
4 that that even has to be said.

5 MR. ST. JOHN: Then there's no need to confer  
6 with the witness off the record.

7 MS. FUDIM: I disagree and I'm going to ask  
8 the witness a question outside the room and you can  
9 ask any followup question you want afterwards and I  
10 can instruct the witness to not answer if I believe  
11 they encroach upon privilege, and you can raise the  
12 issue with the Court, if necessary.

13 MR. ST. JOHN: You don't have a privilege  
14 with this witness, not after he filed his report.

15 MS. FUDIM: I disagree. He's an agent of a  
16 party.

17 MR. ST. JOHN: No. He's a retained expert  
18 witness.

19 MS. FUDIM: Yes, of a party. You can  
20 challenge this with the Court, Mr. St. John. I don't  
21 want to fight with you, but we have different  
22 positions. You're certainly welcome to raise your



1 position with the Court, and if it turns out that  
2 you're right, then, by all means, you can seek the  
3 remedy of seeking an answer to that question; but if  
4 I want to ask the question what he meant by something  
5 outside the presence of the room, I submit that I'm  
6 entitled to do that and you can probe it.

7 MR. ST. JOHN: If that's your position, so be  
8 it. I will be asking you word for word what your  
9 conversation was. I'm just letting everybody know  
10 that's the question that's coming.

11 MS. FUDIM: And I will be instructing the  
12 witness not to answer, but we can get there when we  
13 get there.

14 MR. ST. JOHN: Thank you.

15 VIDEOGRAPHER: Off the record. The time is  
16 3:03.

17 [Ms. Fudim confers with the witness.]

18 VIDEOGRAPHER: On the record. The time is  
19 3:04.

20 EXAMINATION BY COUNSEL FOR DEFENDANT

21 BY MS. FUDIM:

22 Q. You were asked questions by Mr. St. John

1     pertaining to data regarding MPP. Did you perform  
2     any analytic tests on that data?

3             A.     I don't recall doing anything but making  
4     graphs of the number of enrollments in MPP at  
5     different sectors of the border.

6             Q.     You had used the term "logarithmic  
7     scale" during the course of the deposition, and it  
8     wasn't a term that was defined. So for the sake of  
9     completeness, can you define what you mean by  
10    "logarithmic scale" when you use that term?

11            A.     Yes. A logarithmic scale is a scale of  
12    a graph on which a given distance in movement along  
13    that axis is a constant percentage of the quantity  
14    being represented, so that a centimeter up on the Y  
15    Axis, for example, would -- if it represented 10  
16    percent at one portion of the axis, it would  
17    represent 10 percent at the other portion of the  
18    axis.

19            That's true in -- if the axis is not -- if the  
20    numbers are not converted to logarithmic scale. For  
21    example, a scale that is untransformed to numeric, if  
22    it moved, if a quantity moved, from, say, a 100 to

1 150, at the bottom of the scale, representing a 50  
2 percent change, it would correspond to a much smaller  
3 percentage change with the same distance at the upper  
4 part of the scale.

5 So in order for a distance change along the  
6 scale to be a constant percentage of the quantity  
7 being represented, the logarithmic transformation is  
8 essential.

9 Q. You use the term "migrant" in your  
10 report and I believe the term was also used by  
11 counsel in certain questions. How do you define the  
12 word "migrant" and how are you using the term  
13 "migrant" in the report and did that differ at all  
14 for the sake of clarity between how that word was  
15 used here today?

16 A. The dataset that I used from Customs and  
17 Border Protection is what statisticians would call  
18 the universe, that is every person encountered as an  
19 inadmissible migrant by CPB officers, USBP, and OFO  
20 over a 12-year period. That is the -- those are the  
21 migrants that I analyzed in the dataset and I believe  
22 that that is the -- when you say used here today, if

1 you mean in my statements here, I believe that I've  
2 consistently referred to that group of people.

3 Q. Does migrants include both those who  
4 seek asylum and those who do not as you have used the  
5 term in your report and here today?

6 A. Yes, because the complaint refers to  
7 both of those groups. I required a statistical  
8 measure comprising both of those groups, and that is  
9 what is represented by the statistics that I use.

10 Q. In the field of econometrics, is there a  
11 difference between causation and correlation?

12 A. Yes.

13 Q. Can you explain what that difference is?

14 A. The correlation is, simply, the  
15 relationship between two things. For example, when  
16 it rains, people are more likely to be carrying an  
17 umbrella on the street. Causation is a cause and  
18 effect relationship. No one believes that people  
19 carrying umbrellas actually make it rain.

20 Q. There were questions about the ARIMA  
21 model, in particular Figure 2 in your report. In  
22 considering the usefulness of the model, do you

1 consider any particular point in time in isolation?

2 A. No. I do not. In all of the tests that  
3 I run, I display the data on actual encounters and  
4 the data on counterfactual encounters for the entire  
5 10-month period between the advent of the policy and  
6 the available data when I did the analysis, so that  
7 although I mentioned as examples certain time points  
8 in the text, anybody could look at the figures and  
9 make their own assessments for any given time  
10 horizon.

11 Q. Why wouldn't you look at any particular  
12 time in isolation when coming to a determination  
13 about the usefulness and utility of the ARIMA model  
14 for its predictive values?

15 A. [Pause.]

16 Q. Is that a bad question? Do you want me  
17 to rephrase it? You look confused.

18 A. No. No. I don't mean to look confused.  
19 I'm thinking about how to express technical concepts  
20 in nontechnical language. I apologize for taking a  
21 moment to think about it.

22 I was asked to assess factual claims in the

1 complaint. The complaint does not refer to a  
2 specific time horizon at any point. It refers to a  
3 positive effect, and I was asked to assess whether  
4 the available data, which were available over a  
5 10-month time horizon, contain evidence of the effect  
6 asserted in the complaint.

7 The complaint does not say, for example, the  
8 Asylum Processing IFR caused an increase in Month 1,  
9 but a decrease in Month 2 or anything else specific  
10 to any particular month. So it would be  
11 inappropriate to, in any of the three tests that I  
12 run and certainly the second one, which uses the  
13 ARIMA model, to analyze one specific post-policy  
14 month.

15 Q. You had testified that the ARIMA model  
16 is generally not capable of making a perfect  
17 prediction. Why is that?

18 A. I am not aware of any statistical model  
19 that is capable of making perfect predictions. If  
20 that were true, if I knew of a statistical model  
21 capable of making perfect predictions, I could make a  
22 lot of money in the stock market tomorrow.

1 Q. Does the inability of a model to make  
2 perfect predictions mean that the model is otherwise  
3 unreliable?

4 A. Certainly not.

5 Q. And are such models commonly used by  
6 economists in your field?

7 A. The ARIMA model is the most  
8 well-established and commonly-used method for  
9 assessing patterns in univariate time series and  
10 making predictions based on those patterns.

11 MS. FUDIM: Thank you. I have nothing  
12 further.

13 FURTHER EXAMINATION BY COUNSEL FOR PLAINTIFFS  
14 BY MR. ST. JOHN:

15 Q. Mr. Clemens, did you have a conversation  
16 with Ms. Fudim during the break?

17 A. The break a few minutes ago, yes.

18 Q. Tell me everything that was said during  
19 that break.

20 MS. FUDIM: Objection, instruct the witness  
21 not to answer.

22 MR. ST. JOHN: Ms. Fudim, I'm going to call

1 your attention to Federal Rule of Civil Procedure  
2 30(c) which provides that a deposition shall proceed  
3 as it does at the trial and, quote, during -- this is  
4 a quote from a case called Hall v. Clifton Precision  
5 150 F.R.D. 525. It's from the Eastern District of  
6 Pennsylvania, 1993. It's one of the leading cases on  
7 this issue.

8 Quote: During a civil trial, a witness and  
9 his lawyer are not permitted to confer at their  
10 pleasure during the witness' testimony. The same is  
11 true in deposition, end quote.

12 Do you maintain your instruction that the  
13 witness not answer the question?

14 MS. FUDIM: I do.

15 BY MR. ST. JOHN:

16 Q. Sir, are you going to take Counsel's  
17 instruction?

18 A. Yes.

19 Q. Does Ms. Fudim represent you?

20 MS. FUDIM: Objection, calls for a legal  
21 conclusion.

22 You can answer if you know.



1 THE WITNESS: I don't know what "represent  
2 you" means in a legal context. I don't have legal  
3 expertise. So I would not be able to answer that.

4 BY MR. ST. JOHN:

5 Q. Is Ms. Fudim your lawyer, sir?

6 A. She is certainly not my personal lawyer.  
7 I don't have a personal lawyer.

8 Q. Sir, did you have conversations with Ms.  
9 Fudim during other breaks today?

10 MS. FUDIM: Objection to form. Pertaining to  
11 this case?

12 I would note that we had lunch together for  
13 over an hour.

14 THE WITNESS: Did I have a conversation with  
15 her during any of the previous breaks today? I  
16 recall at least two where we talked. Yes.

17 BY MR. ST. JOHN:

18 Q. Did you discuss the deposition testimony  
19 today during those breaks?

20 MS. FUDIM: Objection.

21 BY MR. ST. JOHN:

22 Q. It's a yes or no question.

1 A. I -- I think during lunch, yes.

2 Q. Where did you have lunch?

3 A. It's a place across Farragut that I  
4 think is called Sweet Green.

5 Q. You sat in the dining room?

6 A. No. We ate here.

7 Q. You had a conversation here in the room?  
8 Where was your conversation with Ms. Fudim?

9 MS. FUDIM: Objection. Regarding what?

10 BY MR. ST. JOHN:

11 Q. Where was your conversation with Ms.  
12 Fudim during lunch, during the lunch where you  
13 discussed the deposition?

14 A. I -- there was certainly a moment when  
15 we were walking across Farragut that the deposition  
16 came up.

17 Q. Out amongst the crowd in public, people  
18 going to their lunch hours, you all were walking  
19 across the street or across Farragut and you chatted  
20 about the deposition?

21 MS. FUDIM: Objection to form.

22 You can answer.

1 THE WITNESS: I don't recall there being any  
2 crowd around us or anybody around us.

3 BY MR. ST. JOHN:

4 Q. What was the substance of your  
5 conversation with Ms. Fudim about the deposition?

6 MS. FUDIM: Objection, instruct the witness  
7 not to answer.

8 BY MR. ST. JOHN:

9 Q. Are you going to accept that  
10 instruction?

11 A. Yes.

12 Q. But for Ms. Fudim's instruction not to  
13 answer, do you recall and would you be able to  
14 testify about the substance of that conversation?

15 MS. FUDIM: Objection to form.

16 You can answer if you understand the  
17 question.

18 THE WITNESS: You asked a question of this  
19 form earlier and I didn't understand it then and I  
20 don't understand it now. What would the answer be if  
21 I had not been instructed not --

22 BY MR. ST. JOHN:

1 Q. Sir, you --

2 A. -- to answer. It sounds to me like  
3 you're asking me to answer.

4 Q. Sir, do you remember the conversation  
5 that you had with Ms. Fudim, what was said?

6 A. I remember the general subject of the  
7 conversation.

8 Q. And but for her instruction not to  
9 testify, you would be able to recount that substance  
10 to me. Correct?

11 A. It would depend on what details you  
12 wanted to know. I don't remember every detail of  
13 what we discussed.

14 Q. You would be able to remember some  
15 things. Correct?

16 A. I would be able to remember more than  
17 nothing. Yes.

18 MR. ST. JOHN: We're going to leave the  
19 deposition open. This has been a square violation of  
20 Rule 30. Counsel is advised about the language of  
21 Rule 30 or advised at least that substantive  
22 conversations with the witness while he's on the

1 stand are impermissible.

2 Counsel for United States elected to converse  
3 with the witness anyway, who's a retained expert, not  
4 a client of Ms. Fudim as far as I know and she is  
5 nevertheless instructing the witness not to answer.  
6 We reserve the right to call the witness back at the  
7 United States' or Ms. Fudim's expense and question  
8 him or to seek an adverse inference or to strike any  
9 testimony after those conversations.

10 Ms. Fudim, do you have anything?

11 MS. FUDIM: I have one additional question  
12 for the witness.

13 FURTHER EXAMINATION BY COUNSEL FOR DEFENDANT  
14 BY MS. FUDIM:

15 Q. Mr. Clemens, has anyone, including  
16 myself or other representatives of the United States,  
17 coached you at any point in time in terms of how to  
18 answer questions at this deposition?

19 A. No.

20 MS. FUDIM: Nothing further.

21 MR. ST. JOHN: Off the record.

22 VIDEOGRAPHER: This concludes today's video

1 deposition. We are officially off the record at  
2 3:17.

3 [Whereupon, at 3:17 p.m., the deposition  
4 concluded.]

5 [Signature not waived.]

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CERTIFICATE OF NOTARY PUBLIC

I, CATHERINE B. CRUMP, the officer before  
whom the foregoing deposition was taken, do hereby  
testify that the witness whose testimony appears in  
the foregoing deposition was duly sworn by me; that  
the testimony of said witness was taken by me  
stenographically and thereafter reduced to  
typewriting under my direction; that said deposition  
is a true record of the testimony given by said  
witness; that I am neither counsel for, related to,  
nor employed by any of the parties to the action in  
which this deposition was taken; and further, that I  
am not a relative or employee of any attorney or  
counsel employed by the parties hereto nor  
financially or otherwise interested in the outcome of  
the action.



CATHERINE B. CRUMP

Notary Public in and for the  
District of Columbia

My Commission Expires: October 31, 2027

Case Name: State of Arizona, et al. v. Merrick Garland,  
et al.

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I hereby certify that I have read and examined the foregoing transcript, and the same is a true and accurate record of the testimony given by me. Any additions or corrections that I feel are necessary, I will attach on a separate sheet of paper to the original transcript.

\_\_\_\_\_  
Signature of Deponent

I hereby certify that the individual representing himself/herself to be the above-named individual, appeared before me this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_, and executed the above certificate in my presence.

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